Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

PATRICK L. SWINDALL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari To The United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ROBERT G. FIERER
152 Nassau Street, N.W.
Atlanta, Georgia 30303
(404) 688-5500

WENDELL R. BIRD*
DAVID J. MYERS
Bird & Associates
1150 Monarch Plaza
3414 Peachtree Road, N.E.
Atlanta, Georgia 30326
(404) 264-9400

*Counsel of Record for Petitioner

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QUESTIONS PRESENTED

1. In an issue of first impression in this Court, can the government's unconstitutional use of Speech or Debate Clause evidence in a perjury indictment and trial be artificially limited after the fact to only three of nine perjury counts, contrary to decisions of the Third Circuit and the Fourth Circuit that inadmissible Speech or Debate Clause evidence on one count voids convictions on all other counts, when (i) the grand jury concededly viewed the Speech or Debate Clause evidence as reflecting negatively on the defendant's overall credibility in deciding to indict, (ii) the trial jury was given no instruction limiting the unconstitutional evidence to any particular count, and (iii) the prosecutor vehemently argued to the jury and to the court that the Speech or Debate Clause evidence supported perjury convictions on *all* counts, or does such an approach impermissibly dilute the protections of the Speech or Debate Clause?

2. Can the artificial distinction between "affected" and "unaffected" counts be based on the prosecutor's *purpose* in using the unconstitutional Speech or Debate Clause evidence, contrary to this Court's holding in *United States v. Helstoski*, 442 U.S. 477 (1979)?

3. Can the prejudice of an unannounced ex parte conference between the district judge and the prosecutor, which immediately resulted in the interruption and striking of the defense's key witness's testimony, be artificially limited after the fact to only three of nine perjury counts, when the improperly stricken testimony would have rebutted the government's unconstitutional evidence

that reflected negatively on the defendant's credibility on all nine perjury counts?

4. Does the interruption and striking of all of the key witness's testimony, rather than striking specific testimony pursuant to specific objections, abridge constitutional rights and can it be artificially limited to only three of nine perjury counts, particularly when the judge refused to allow discussion or an offer of proof?

5. Does an unannounced ex parte conference between the district judge and the prosecutor, which immediately resulted in the interruption and striking of the defense's key witness's entire testimony, abridge Sixth Amendment and due process rights and can it be harmless error?

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Petitioner PATRICK L. SWINDALL respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on June 9, 1993.

OPINIONS BELOW

The decision of the United States Court of Appeals denied Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc (Appendix II at A-61) on June 9, 1993, and is unpublished. The Eleventh Circuit had reversed the convictions of Petitioner on three of nine perjury counts, but had affirmed convictions on the remaining counts, and that decision is reported at 971 F.2d 1531 (11th Cir. 1992) (Appendix I at A-1).

JURISDICTION

The judgment of the Eleventh Circuit is dated and was entered on June 9, 1993 (Appendix II at A-61). Accordingly, the deadline for this Petition is September 7, 1993.

This Court's jurisdiction lies under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Speech or Debate Clause (Art. 1, Sec. 6) and the Fifth and Sixth Amendments to the U.S. Constitution. Pertinent parts of these provisions are reproduced in Appendix IV to this Petition.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS

Petitioner, a former member of the U.S. House of Representatives, was indicted by the grand jury on October 17, 1988 (three weeks before he stood for re-election) and charged with ten counts of knowingly making false material declarations in his testimony before the grand jury (eight months before) in violation of 18 U.S.C. § 1623. Petitioner's first trial, before the election, ended in a mistrial on October 26, 1988. The second trial began on May 23, 1989 and ended on June 20, 1989 with a guilty verdict on nine counts (the district judge dismissed Count 4 during the trial). Petitioner's post-trial motions in the district court were denied and he timely appealed. The Speaker and Bipartisan Leadership Group of the U.S. House of Representatives filed a Brief of Amicus Curiae on behalf of Petitioner. Petitioner's two subsequent motions to dismiss the indictment for governmental misconduct and for new trial based on newly discovered evidence were denied and were timely appealed. The Eleventh Circuit consolidated the three appeals.

On August 31, 1992, a panel of the Eleventh Circuit reversed Petitioner's convictions on counts 1, 9, and 10, and remanded to the district court with instructions to vacate the convictions and to dismiss those counts of the indictment with prejudice because of violations of the Speech or Debate Clause before the grand jury and at trial. The panel declined to reach the Sixth Amendment arguments and affirmed Petitioner's convictions on the remaining six perjury counts.

Petitioner filed a Petition for Rehearing and Suggestion for Rehearing En Banc. Initially, the Eleventh Circuit issued an Order

saying that no poll had been requested but then rescinded that Order and required the government to respond to the Petition for Rehearing. App. II at A-57, 59. Five months after receiving the government's brief, the Eleventh Circuit denied the Petition for Rehearing and the Suggestion for Rehearing En Banc, stating that the Court had been polled at the request of one of the members of the Court and a majority of the Circuit Judges in regular active service had not voted in favor of rehearing en banc.

B. STATEMENT OF ADDITIONAL FACTS

The following facts highlight the factual and constitutional invalidity of the government's entire case: (i) Petitioner was a member of the House Banking Committee from June 1987 through December 1988. (ii) The government "proved" that Petitioner committed perjury by showing that Petitioner, contrary to his statements to the grand jury that he was unaware of the "structuring transactions" provision of Title 31 (31 U.S.C. § 5324), was necessarily intimately aware of those provisions because of his membership on the Banking Committee. (iii) The "structuring transactions" provision in fact was enacted by Congress in October of 1986, *before* Petitioner was a member of the Committee. (iv) The district judge, after an unannounced ex parte conference with the prosecutor, struck the testimony by another Congressman that Petitioner did not sit on the Committee when the "structuring transactions" provision of Title 31 was enacted. Thus, Petitioner did not have the "unique and specific knowledge" claimed by the government, but was prevented from proving it.

Many of the facts of the case have been set out in the Eleventh Circuit's opinion, 971 F.2d at 1535-39 (App. I at A-3-14), and

those facts need not be repeated in full here. However, certain key facts were omitted from the panel opinion, and other facts were described incorrectly.

First, because it overlooked dispositive testimony by the grand jury representative, the panel erroneously distinguished counts 1, 9, and 10 from the remaining six counts as the only counts to which unique and specific knowledge of illegality was relevant. 971 F.2d at 1542 (App. I at A-20). (The unique and specific knowledge of illegality allegedly came from Petitioner's membership on congressional committees, which was proved by unconstitutional Speech or Debate Clause evidence.) The foreperson testified at trial that the grand jury found that Petitioner's alleged knowledge of illegality affected all nine counts because (i) the grand jury looked "at the entire package" and (ii) the alleged knowledge of illegality damaged Petitioner's credibility (which would be highly material on all perjury counts):

> Q. At the time -- you indicated that by Mr. Swindall stating that he never satisfied himself with respect to criminality, would that statement, if you had believed that, would that have made Mr. Swindall more credible or less credible with the grand jury?
> A. Yes, *it would have added to his credibility,* but could I continue?
> Q. Yes, sir.
> A. But, you know, the later testimony and the other evidence that was presented, *we had to look at the whole thing* in the grand jury. And *when you look at the entire package,* it was obvious about the criminality of it and all to us.

R. 29-108 (App. III at A-67-68).[1] The unconstitutional

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[1]In this brief, all emphasis is added unless otherwise noted.

testimony from which the grand jury reached that conclusion was also read to the trial jury. The prosecutor argued at trial that all of the perjury counts were proved by the Speech or Debate Clause activities, *e.g.*, R. 37-143 (App. III at A-70-71), and argued to the judge that the Speech or Debate activities were "critical" to the entire indictment. R. 5-73, 74 (App. III at A-63-64). He was right.

Second, the panel's shorthand summary of Count 7 at one point in its opinion may create the misimpression that Petitioner denied that there was any relationship between the $150,000 check he received from LeChasney's attorney and the $850,000 transaction he discussed with the undercover agent. 971 F2d at 1538 (App. I at A-II). In fact, Petitioner, in the same series of questions that comprise Count 7, acknowledged that the undercover agent's money would have been used to reimburse LeChasney *if* he and the agent had ever reached an agreement regarding the terms of the transaction. Gov. Ex. 44T at 108-110 (App. III at A-72-74). Corroborating Petitioner's grand jury testimony, LeChasney testified at trial that he told the agent that he had used his own money to fund the $150,000 check, R. 27-208 (App. III at A-67), and that Petitioner "could have perceived that he was borrowing the money from [LeChasney]." R. 27-209 (App. III at A-67). A careful reading of the actual question upon which Count 7 is based establishes that Petitioner merely denied that he was "*sufficiently agreeable on the details* [of the transaction with Agent Mullaney] that [he] went forward and received a hundred and fifty thousand dollar check from Mr. LeChasney on September 25th, 1987." Gov. Ex. 44T at 109 (App. III at A-73). Significantly, at trial, Agent Mullaney admit-

ted on cross-examination that "as of September 25th, [he and Petitioner] weren't sufficiently agreeable on the details to go forward with the $150,000 transaction." R. 25-52, 53 (App. III at A-66-67).

Third, the Eleventh Circuit panel incorrectly stated that Petitioner was questioned before the grand jury regarding his knowledge of *both* Title 18's money-laundering provisions and Title 31's transaction-structuring provision. 971 F.2d at 1535 & nn. 3-4, 1539 (App. I at A-5, 14). In fact, as the assistant U.S. attorney told Petitioner at the outset of his grand jury testimony, the *exclusive* focus of the grand jury was the "structuring transactions" provision of Title 31, Gov. Ex. 44T at 3 (App. III at A-71-72), and Petitioner was questioned only about that provision of Title 31. Gov. Ex. 44T at 46, 52 (App. III at A-72). The distinction is significant because the *mens rea* requirement for a Title 31 violation is much stricter than that for a Title 18 violation. *See infra*, p. 17.

Fourth, contrary to the government's representation, which the Eleventh Circuit recites without Petitioner's rebuttal, 971 F.2d at 1541 n.9 (App. I at A-19), the bill that Petitioner co-sponsored (not "co-authored") was an amendment to Title 18, and was therefore not a "predecessor" of the Title 31 "structuring transactions" provision about which Petitioner was questioned before the grand jury. This is significant because the Title 18 bill Petitioner co-sponsored did not contain any "structuring transactions" provision.

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit's decision in this case permits introduction of evidence offensive to the Speech or Debate Clause without penalty, and thereby violates the absolute privilege of the Clause. The Eleventh Circuit artificially deemed some counts infected by the violation and other counts uninfected (contrary to decisions of the Third and Fourth Circuits), using as its criteria the prosecutor's supposed purpose in introducing the unconstitutional evidence (contrary to this Court's decisions and contrary to the prosecutor's actual use of the evidence on *all* counts). Moreover, because the Circuit Court cited the Speech or Debate Clause as a justification for never reaching the issues presented by the prosecutor's violation of the Sixth Amendment (an unannounced ex parte conference between the prosecutor and trial judge that caused the trial judge to strike the entirety of a key defense witness's testimony), the Eleventh Circuit's decision also violates the absolute privilege of the Sixth Amendment.

I. AFTER CORRECTLY FINDING THAT SPEECH OR DEBATE RIGHTS WERE VIOLATED, THE ELEVENTH CIRCUIT ACTED CONTRARY TO THE LOGIC OF THIS COURT'S PRECEDENT AND TO THE EXPRESS HOLDINGS OF OTHER CIRCUITS IN PURPORTING TO EXCISE THE INFECTION BY DEEMING IT CONFINED TO ONLY THREE COUNTS, WHEN EVERY OTHER COUNT WAS ALSO A PERJURY COUNT AND WAS UNAVOIDABLY INFECTED BY THE VIOLATION.

A. This Court Has Never Addressed Whether the Infection of a Speech or Debate Clause Violation Can Be Artificially Limited to Particular Counts.

In *Johnson v. United States*, 383 U.S. 169 (1966), this

Court declined to review the Fourth Circuit's holding that the government's introduction of Speech or Debate Clause evidence infected the trial of every count of the indictment, concluding that the government had not preserved that issue for resolution. 383 U.S. at 185-86. On the remaining count, the Court reversed the conviction and required that the government eliminate "all references" to the Speech or Debate Clause evidence and that the retrial be "wholly purged of elements offensive to the Speech or Debate Clause." 383 U.S. at 185.

In *United States v. Helstoski*, 442 U.S. 477 (1979) (*Helstoski I*), this Court affirmed the Third Circuit in holding that the government would be precluded from offering any evidence of past legislative acts in any form at the trial of a Congressman for bribery. Because the trial had not yet occurred, the Court had no occasion to consider the effect of unconstitutional Speech or Debate Clause evidence on other counts. (However, the Third Circuit on remand held that the Speech or Debate Clause violation required dismissal of all counts. *United States v. Helstoski*, 635 F.2d 200 (3d Cir. 1980) (*Helstoski II*).

Thus, this case squarely presents the issue that was not presented in *Johnson* (because of the government's waiver of the issue) and in *Helstoski* (because of the procedural posture of the case in this Court).

This case also differs from previous Speech or Debate Clause cases because the unconstitutional evidence was *misused* to obtain a perjury conviction where no perjury occurred. This is not a conspiracy or a bribery case in which the Speech or Debate evidence is the illegal activity itself (such as a purchased vote or

speech). Instead, the unconstitutional Speech or Debate evidence was misused to "show" "unique and specific knowledge of illegality" that did not exist, but that allegedly supplied the motive to lie in response to otherwise innocuous questions.

B. As a Result of the Eleventh Circuit's Judgment, the Circuit Courts of Appeals Are Now in Conflict on this Issue.

In spite of the lack of any opportunity for this Court to address the issue, prior to the Eleventh Circuit's decision in this case, the Circuit Courts of Appeal were unanimous in holding that the introduction of unconstitutional Speech or Debate Clause evidence required dismissal or retrial (depending on whether the violation occurred before the grand jury or at trial) of *all* counts, *including* counts on which the evidence in question was not directly relevant.

In *United States v. Johnson*, 337 F.2d 180 (4th Cir. 1964), a Congressman was indicted and convicted on one count of conspiracy to defraud the United States and seven counts of conflict of interest. The Fourth Circuit dismissed the conspiracy count of the indictment because it had been proven in part with Speech or Debate Clause evidence. 337 F.2d at 192. The Fourth Circuit also vacated the convictions on the other seven counts, even though it found the non-Speech or Debate Clause evidence sufficient to support a guilty verdict, because "the invalidity of count one as applied to Johnson was obviously prejudicial to his right to the unbiased consideration of the jury on the remaining counts." 337 F.2d at 204.

> The conclusion is unavoidable that this mass of evidence and comment, all inadmissible against Johnson, infected the jury's consideration of his innocence or guilt under

the conflicts of interest counts.

Id. The same prejudice occurred here.

In *Helstoski II*, 635 F.2d 200, Congressman Helstoski had been indicted on five counts, including bribery, perjury, conspiracy, and obstruction of justice.[2] The Third Circuit affirmed the district court's categorical rejection of the government's suggestion that the counts charging obstruction of justice and perjury could be isolated from the other counts that supposedly bore more directly on legislative acts:

> [I]t is totally unrealistic to cull out single counts of this indictment. The receipt of evidence in violation of Helstoski's Speech or Debate privileges permeated the entire grand jury process. The entire proceeding was tainted by such evidence.

635 F.2d at 202. The Third Circuit concluded that "the infection cannot be excised," in part because of the prosecutor's practice of reading the transcripts of Helstoski's testimony to previous grand juries to each succeeding grand jury. 635 F.2d at 205. That practice "had the effect of aggravating the original error of admitting evidence" and made "unrealistic any attempt to cull out single counts of the indictment." *Id.* (An even more egregious contamination occurred here, where the prosecutor read Petitioner's grand jury testimony, including Speech or Debate Clause evidence, to the *trial* jury.) As a result, the Third Circuit affirmed the district court's dismissal of the entire indictment.

In Petitioner's case, by contrast, where every count was for

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[2]The 12 original counts of the indictment were reduced to five when the government voluntarily dismissed seven counts after the Supreme Court's remand to the district court.

perjury so that Petitioner's credibility on any one count necessarily affected his credibility on all other counts, the Eleventh Circuit found that the government had violated Petitioner's Speech or Debate Clause privileges both at the grand jury level and at trial, and held that the appropriate remedy was dismissal of the indictment. However, the circuit inexplicably limited that dismissal to "the affected counts." 971 F.2d at 1543 (App. I at A-23). Compounding its error, the Eleventh Circuit did little more than incant a distinction between the three "affected" counts and the six non-infected counts. The Eleventh Circuit's result in this case is therefore in direct conflict with the decisions of the Third and Fourth Circuits.

C. The Eleventh Circuit Was Correct that the Speech or Debate Clause Was Abridged by Impermissibly Using Questions and Alleged Evidence To Challenge Petitioner's Credibility on Key Issues.

The Eleventh Circuit correctly described the pervasiveness of the unconstitutional Speech or Debate Clause evidence before the grand jury and at trial. 971 F.2d at 1539-42 (App. I at A-14-20). The Eleventh Circuit also correctly held that use of that evidence violated the Speech or Debate Clause, and that the remedy for the violations was dismissal of the affected counts. *Id.* at 1543. Unfortunately, the Eleventh Circuit artificially and erroneously limited the effect of the violations to three of nine counts, contrary to the *only* testimony from the grand jury.

If the Eleventh Circuit had applied its correct standard to the overlooked evidence from the grand jury foreperson, who was called as a witness by the government, the Eleventh Circuit would have dismissed the remaining counts. The Eleventh Circuit's standard

for limiting the conceded infection to three counts was that those counts involved alleged knowledge of criminality; the grand jury representative testified that Mr. Swindall's denial of knowledge of "the criminality of it" affected "the entire package" and affected "his credibility." R. 29-108 (App. III at A-68).

D. Those Speech or Debate Clause Violations Necessarily Infected Every Count of the Indictment, Each of Which Was for Perjury.

1. Otherwise, Prosecutors Are Encouraged To Use Unconstitutional Speech or Debate Clause Evidence To Prosecute Multiple Count Indictments.

If the Eleventh Circuit's approach is allowed to stand, it will invite abuse of the Speech or Debate Clause by prosecutors, who will have every incentive to use Speech or Debate Clause evidence before the grand jury and at trial, so long as they can craft a multiple count indictment. With multiple counts pending, prosecutors may violate the Speech or Debate Clause wholesale, using otherwise impermissible evidence to sway grand juries to indict and trial juries to convict, confident that some percentage of their indictment counts will survive when the Speech or Debate Clause violations are appealed and artificially limited.

Thus, the Eleventh Circuit's approach in this case is both bad constitutional interpretation and bad policy.

2. The Evidence Offensive to the Speech or Debate Clause Was Actually Used for All Counts.

The unconstitutional evidence was not only theoretically material, but was in fact used by the government in getting an indictment, was understood by the grand jury to be material to all nine counts, and was then read and argued to the trial jury.

First, at trial, the grand jury foreperson, whom the govern-

ment presented as the sole representative of the grand jury, admitted the pervasive effect of the Speech or Debate evidence in the decision to indict Petitioner:

> Q. At the time – you indicated that by Mr. Swindall stating that he never satisfied himself with respect to criminality, would that statement, if you had believed that, would that have made Mr. Swindall more credible or less credible with the grand jury?
> A. Yes, *it would have added to his credibility,* but could I continue?
> Q. Yes, sir.
> A. But, you know, the later testimony and the other evidence that was presented, we had to look at *the whole thing* in the grand jury. And when you look at *the entire package,* it was *obvious about the criminality of it and all* to us.

R. 29-108 (App. III at A-67-68). Thus, the grand jury indicted Petitioner on nine perjury counts based in large part on its assessment of Petitioner's credibility, which was necessarily based on his answers to *all* questions, including the many questions that violated the Speech or Debate Clause. The grand jury could not and did not sever three counts from "the entire package."

Second, the trial jury heard and relied on this evidence, because the government read the grand jury testimony to it.

Third, the district judge based his finding of materiality, which is a necessary element of each perjury conviction, on these same Speech or Debate Clause violations.

Fourth, the Assistant U.S. Attorney's closing argument relied on the Speech or Debate Clause evidence as to all counts and not merely as to three counts:

> And he also, I'm reminded by Mr. Swindall, *was on the Banking and Judiciary Committee, the very committees that had jurisdiction over these two laws. There are*

> *about 240 million Americans. 435 of them are in Congress. And the documents will go out with you. Do you know how many of them on the Republican side are on both the Judiciary and the Banking Committees at that time in the One-Hundredth Congress? Two; two.*
>
> And yet he would have you believe he was not aware of the law. Who then will we hold accountable to the law? Who then stands before the law, if not a man that's a lawyer, *a congressman on those committees, and only two Republican congressm[e]n on both of those committees.*
>
> But yet he did not know.

R. 37-143 (App. III at A-70-71). Thus, the government's closing argument did not limit its use of the Speech or Debate Clause material to three counts. Aware that knowledge of the "structuring transactions" provision of Title 31 was material to all counts, *United States v. Brown*, 954 F.2d 1563, 1568 (11th Cir. 1992), the government chose, as its sole evidence of that knowledge for all counts, to use evidence that violated the Speech or Debate Clause. It had earlier called the evidence "critical to the prosecution of this case," R. 5-74 (App. III at A-64), and it in fact formed the heart of the government's case. The government thereby admitted that the violation could not be limited to three counts.

3. The Evidence Offensive to the Speech or Debate Clause Was Material to All Counts.

The offending Speech or Debate Clause evidence was material to all counts before the grand jury and at trial for two reasons. (That evidence was also flatly wrong, as Rep. Frank tried to testify. *Infra* p. 24; R. 33-93, 97 (App. III at A-68-69) (trial testimony); R. 7-140 (App. III at A-65-66) (affidavit).)

a. All Perjury Counts Are Necessarily Infected by Improper Evidence Challenging a Defendant's Credibility on Several Other Perjury Counts.

Improper evidence on any perjury count necessarily infects every other perjury count as a matter of law and common sense (even assuming the correctness of the Eleventh Circuit's arbitrary conclusion that the offending evidence was directly material only to three of nine perjury counts). Having been persuaded by the government's improper evidence that Petitioner was lying as to counts 1, 9, and 10, the jury would almost certainly have been influenced to find that Petitioner was lying with respect to the other six statements at issue. Simply put, a defendant's credibility and tendency to lie is relevant to *all* counts in a perjury case, particularly when they all involve the same financial transaction.

The Fourth Circuit confronted this issue in *United States v. Beach*, 296 F.2d 153 (4th Cir. 1961), and concluded that perjury counts cannot be compartmentalized. In *Beach*, the jury was permitted to go outside the trial evidence and to conduct an experiment to verify the truth of the defendant's testimony on one of three perjury counts. The government contended, as it does here, that only the conviction on that specific perjury count could be reversed. The Fourth Circuit rightly disagreed:

> [W]e believe that the government oversimplifies the question. The defendant was charged with testifying falsely as to three different matters. The jury may have been in doubt as to all three when they sent for the drop cord. If so, and if they then proceeded to operate the machines with the drop cord under conditions quite different from those which existed in the Childress home, they might very well have come to the conclusion that the defendant had testified falsely as to hearing the machines.
>
> *Having themselves proved to their satisfaction that the defendant was lying* about not hearing the machines in operation *the jury might then, in case of doubt as to the other two counts, easily have been influenced to*

> *find that the defendant was lying with respect to the other two matters also.*

296 F.2d at 159. *See also Helstoski II,* 635 F.2d at 202 ("totally unrealistic to cull out single counts" of indictment for perjury and obstruction of justice when unconstitutional Speech or Debate Clause evidence used).

The Fourth Circuit also held that the error could not even be cured by an instruction to the jury to consider each count separately:

> But jurors' minds are not that easily compartmentalized. *Once convinced that the defendant was lying with respect to one count it would become easy for any normal juror to conclude that he was lying on the other two counts as to which they might otherwise have had doubts.*
>
> Certainly it would have been error to permit the introduction of evidence to the effect that the defendant had previously committed perjury in another entirely extraneous matter not involved in this case at all. It would seem to follow that improper proof of lying as to one count included in this case would be equally, if not more, prejudicial.
>
> It follows therefore that . . . the verdict on all three counts must be set aside and a new trial awarded the defendant.

Id. at 159-160. Here, because the constitutional violation also occurred before the grand jury, the indictment should also be set aside. *See Helstoski II,* 635 F.2d at 204 (all counts of indictment for both perjury and obstruction of justice dismissed because "improper [Speech or Debate] testimony before the grand jury was a substantial factor underlying the indictment.").

Inexplicably, the Eleventh Circuit in this case seemed to recognize the infection problem without altering the remedy accordingly.

> One must also bear in mind that this was a perjury indictment. *The impressions formed by the grand jury that Mr. Swindall was lying were based in part on the AUSA's questioning of the Congressman about Speech or Debate matters.* The grand jury observed Mr. Swindall respond to questions about his committee memberships, and then judged the truthfulness of his statements disclaiming knowledge or recollection of other matters. With respect to the affected counts, *no new indictment can issue from an excised transcript of Mr. Swindall's grand jury testimony because the decision to indict was inextricably linked to the grand jury's impressions of Mr. Swindall's answers to improper questions. As in Helstoski II, "the infection cannot be excised."* 635 F.2d at 205.

971 F.2d at 1549 (App. I at A-36-37). The Eleventh Circuit simply incanted that there were three "affected counts" and six non-infected counts, contrary to its infection reasoning.

b. The Improper Evidence Supplied an Essential Alleged Motive To Lie on All Counts.

The unconstitutional Speech or Debate evidence was highly material to all counts for a reason recognized by the Eleventh Circuit – it was used to show Petitioner's alleged "motive to lie in response to such otherwise seemingly innocuous questions." 971 F.2d at 1542 (App. I at A-22). While the Eleventh Circuit claimed that the Speech or Debate evidence showed a motive to lie for only three counts, it in fact gave an equally strong motive to lie for the remaining six counts, and was in fact used to persuade the jury that Petitioner did lie about not recalling "being insulated by LeChasney from the source of the undercover agent's money" (Count 2), stating "that he walked away from the deal on September 13, 1987, after the Greenbriar meeting" (Count 3), not recalling "being told by the undercover agent that the source of the cash was

drug-sale proceeds" (Count 5), "insisting that the money be delivered without my being present" (Count 6), stating "that the $150,000 check he received from LeChasney 'had nothing to do with' the larger, $850,000 transaction with the undercover agent" (Count 7), and forgetting that he had delivered the $150,000 check to his secretary to deliver "to the builder of his home" (Count 8). 971 F.2d at 1538-39 (App. I at A-12-13). All of those were "seemingly innocuous questions" unless Petitioner, by Speech or Debate activities, were shown to know that something was illegal or suspicious under the "structuring transactions" provision of Title 31, as the government expressly argued to the jury. *Supra* p. 13.

The entire context of the grand jury testimony was the investigation of the violations of the "structuring transactions" provision of Title 31 (*not* Title 18 violations, contrary to the Eleventh Circuit panel's opinion). An essential element of Title 31 violations is willfulness: the government must prove that the defendant (i) was aware of bank reporting requirements for currency transactions and (ii) sought to evade those requirements through money structuring. *E.g., Brown*, 954 F.2d at 1568. Thus, under the prosecution's theory of the case, Petitioner's alleged knowledge of Title 31 (which it "proved" by Speech or Debate evidence) gave him a motive to make *each* allegedly perjured statement; that is, Petitioner allegedly falsely denied recalling the statements recited above because Petitioner allegedly knew that the transaction being discussed would violate Title 31. That is why the Assistant U.S. Attorney unambiguously argued to the district court that the Speech or Debate Clause evidence was "critical to the prosecution of the case by the United States." R. 5-74 (App.

III at A-64). The government itself deemed the Speech or Debate evidence critical to all counts, not to only three counts. By definition, Petitioner could only be indicted for *material* false statements. 18 U.S.C. § 1623. Therefore, each of the nine challenged statements must have been material to the grand jury's investigation of Title 31 violations, and all were equally infected. The grand jury foreperson's testimony at trial establishes that all of Petitioner's Speech or Debate testimony was in fact material to the "entire package." R. 29-108 (App. III at A-68).

4. Violation of the Speech or Debate Clause on Any Count Requires Reversal on All Counts.

Petitioner was entitled to a trial "wholly purged of elements offensive to the Speech or Debate Clause." *Johnson*, 383 U.S. at 185. Under the Eleventh Circuit's ruling in this case, Petitioner is entitled only to one-third of a trial purged of offensive Speech or Debate Clause evidence; the other two-thirds of the same trial, also on perjury counts, is upheld. The Eleventh Circuit's cramped application of the Speech or Debate Clause rights is directly contrary to this Court's instruction that "the legislative privilege will be read broadly to effectuate its purposes." *Id.* at 180.

a. No Such Thing as Harmless Error.

As this Court held in *Johnson*, 383 U.S. at 182, the Speech or Debate Clause protections are "prophylactic." As with other prophylactic constitutional protections, such as the Sixth Amendment right to counsel,[3] there is no such thing as a harmless

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[3] *See* Tribe, American Constitutional Law 1634 (2d ed. 1988) (describing the right to counsel as "a prophylactic rule").

error:

> The Court has uniformly found constitutional error *without any showing of prejudice* when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding.

United States v. Cronic, 466 U.S. 648, 659 n. 25 (1984). Thus, the presumption must be that *all* counts of Petitioner's indictment and conviction were infected.

b. No Precautions to Distinguish Between Counts at Trial

Even the dissenters in *Johnson*, who believed that infected counts could be separated from non-infected counts, found such a separation possible *only* where (i) the government's closing argument and (ii) the trial court's jury instructions unimpeachably separated the infected counts from the other counts, and (iii) "the trial participants were well aware that a finding of criminality on one count did not authorize similar conclusions as to other counts" and they conscientiously followed that rule. 383 U.S. at 760 (Warren, C.J., dissenting). Here, none of those three precautions were taken (because the counts were not treated as separable until long after the indictment and trial).

In similar cases, the Third and Fourth Circuits have concluded -- contrary to the Eleventh Circuit in this case -- that the infection from the use of evidence offensive to the Speech or Debate Clause before the grand jury or at trial cannot be limited only to certain counts. *Helstoski II,* 635 F.2d at 201, 205 (dismissing all counts of indictment); *Johnson,* 337 F.2d 180 (reversing convictions on all counts).

c. Post-Trial Distinction of Counts Nonsensical.

The Eleventh Circuit's distinction between the "affected" three

counts and the "unaffected" six counts is artificial because (i) it ignores the fact that none of the other six allegedly false statements was at all material to the grand jury's investigation unless Petitioner knew that the underlying transaction was illegal, and (ii) that knowledge of illegality could only be established by unconstitutional Speech or Debate evidence. (Of course, materiality is a necessary element of a violation of 18 U.S.C. § 1623.)

Regarding Count 8, for example, whether Petitioner gave the $150,000 check to his building contractor or to his secretary is immaterial unless the motive for any allegedly false testimony on that issue was to avoid prosecution for violating the currency laws of Title 31. As the Eleventh Circuit recognized, 971 F.2d at 1542 (App. I at A-22), the questions at issue in the six remaining counts also were "innocuous" but, as the government argued to the jury, R. 37-143 (App. III at A-70-71), the questions became material in light of Petitioner's alleged knowledge of Title 31.

Even the sole example given by the Eleventh Circuit (Count 5) does not support its artificial parsing of the counts. Count 5 "alleged that Swindall falsely stated that he did not recall being informed by Agent Mullaney that the agent had in the past violated the laws of the United States." 971 F.2d at 1542 (App. I at A-21). In fact, at trial Mullaney denied ever telling Petitioner that he violated " the laws of the United States." R. 25-41 (App. III at A-74). Contrary to the Eleventh Circuit's analysis, such a statement by the agent is meaningless (assuming he made the statement, which he did not), and there is no reason falsely to deny recalling it. Unspecified violations of unspecified laws in the unspecified past would not raise the specter of Title 31 violations

absent the "unique and specific knowledge of illegality" that the government claimed Petitioner had by virtue of his acts as a Member of Congress.

E. The Eleventh Circuit's Reliance on the Prosecutor's Stated Purpose to Artificially Limit the Effect of the Violation of the Speech or Debate Clause Violates the Absolute Privilege Provided by the Clause and Directly Conflicts with this Court's Decisions Barring Any Showing of a Member of Congress's Legislative Acts.

After correctly concluding that the prosecutor repeatedly violated Swindall's privilege under the Speech or Debate Clause, the Eleventh Circuit limited the effect of the violations to only three of the nine perjury counts contained in the indictment, based solely on the prosecutor's supposed *purpose* in offering the Speech or Debate Clause evidence:

> In our view, Swindall's Speech or Debate claims affect only Counts One, Nine, and Ten. *Only with respect to these counts did the government use evidence of Swindall's committee memberships to show that the had "unique and specific knowledge" of . . . illegality* . . . .
>
> . . . .
>
> The remaining counts are unaffected by Swindall's Speech or Debate claims *because the government did not attempt to prove Swindall's "unique and specific knowledge"* of the specific contents of 31 U.S.C. § 5324 or 18 U.S.C. § 1956 to give him a motive to lie.

971 F.2d at 1542 (App. I at A-20, 21).

The Eleventh Circuit's holding limiting the effect of the prosecutor's violation of the privilege afforded Petitioner by the Speech or Debate Clause is in direct and irreconcilable conflict with this Court's holding in *United States v. Helstoski*, 442 U.S. 477. In *Helstoski*, this Court held, without qualification

or limitation, that the Clause precludes *any* showing of the legislative acts of a Member of Congress:

> The Clause . . . "precludes any showing of how [a legislator] acted, voted or decided." . . .
>
> We therefore agree with the Court of Appeals that references to past legislative acts of a Member cannot be admitted without undermining the values protected by the Clause.

Helstoski, 442 U.S. at 488-89.

In limiting the effect of the prosecutor's violations of the Clause, the Eleventh Circuit reasoned that the prosecutor's supposed *purpose* in violating the Clause should be determinative of which counts of an indictment are affected by the violation. The Eleventh Circuit's reasoning wholly misconstrues the protection of the Speech or Debate Clause. In fact, the Eleventh Circuit's opinion in this regard is similar to the opinion expressed by Justice Stevens in his dissent in *Helstoski*, which the majority of this Court expressly rejected:

> Mr. Justice Stevens misconstrues our holdings on the Speech or Debate Clause in urging: "The admissibility line should be based on the purpose of the offer rather than the specificity of the reference." *The Speech or Debate Clause does not refer to the prosecutor's purpose in offering evidence.* The Clause does not simply state, "No proof of a legislative act shall be *offered*"; the prohibition of the Clause is far broader. It provides that Members "shall not be *questioned* in any other Place." Indeed, as Mr. Justice Stevens recognizes, the admission of evidence of legislative acts "may reveal [to the jury] some information about the performance of legislative acts and the legislator's motivation in conducting official duties." Revealing information as to a legislative act – speaking or debating – to a jury would subject a Member to being "questioned" in a place other than the House or Senate,

> thereby violating the explicit prohibition of the Speech or Debate Clause.

442 U.S. at 489-90 (some original emphasis).

The Eleventh Circuit's holding in the instant case also conflicts with the holding of the Third Circuit on remand:

> The [Speech or Debate] privilege is not one of nondisclosure but of nonevidentiary use. *In re Grand Jury (Cianfrani)*, [563 F.2d 577, 584 (3d Cir. 1977)]. It is also testimonial in nature -- a congressman may not be required to testify to a legislative act even in third party cases. *Gravel v. United States*, 408 U.S. 606, 622 (1972). *Helstoski v. Meanor*, [442 U.S. 500, 506 (1979)].

Helstoski II, 635 F.2d at 203-204.

After recognizing the absolute privilege afforded Members by the Clause, the Third Circuit dismissed *all* of the counts of Helstoski's indictment, including the counts that were not dependent on the introduction of Speech or Debate material.

> Observance of this rule [not introducing any legislative acts by a Member] will not foreclose indictments for illegal conduct beyond the scope of the speech or debate clause. All that is required is that in presenting material to the grand jury the prosecutor uphold the Constitution and refrain from introducing evidence of past legislative acts or the motivation for performing them. *In that way the clause will meet its expectation of preserving the constitutional structure of separate, coequal, and independent branches of government.*

Helstoski II, 635 F.2d at 206.

The Eleventh Circuit's limitation of the Clause clearly violates the important and substantial values that the framers of the Constitution sought to protect with the Clause. Accordingly, the Eleventh Circuit's opinion should not stand.

II. THE ELEVENTH CIRCUIT DEPARTED FROM THIS COURT'S PRECEDENT BY ARTIFICIALLY LIMITING THE SIXTH AMENDMENT VIOLATION (THE DISTRICT JUDGE'S EX PARTE CONFERENCE WITH THE PROSECUTOR AND SUBSEQUENT STRIKING OF UNFINISHED DEFENSE TESTIMONY) TO ONLY THREE COUNTS.

Congressman Barney Frank (D.-Mass.) was Petitioner's key defense witness who, among other topics of testimony, would have disproved as a matter of fact the unconstitutional Speech or Debate Clause evidence relied on by the government to show Petitioner's knowledge of Title 31. He would have shown that Petitioner was *not* on "the very committees that had jurisdiction over these two laws." Aff. of Frank, R. 7-140 (App. III at A-65-66). *Before Rep. Frank had completed his testimony on direct examination,* however, the assistant U.S. attorney and the district judge held an unannounced ex parte conference from which Petitioner and his counsel were excluded. During the ex parte conference, the prosecutor (to speak charitably) misinformed the district judge about particular evidence on which he planned to cross-examine Rep. Frank. As a result of that conference, the district judge prohibited any further examination of Rep. Frank and told the jury he was striking his prior testimony entirely.[4] Rep. Frank's testi-

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[4]Appellant objected as soon as he learned of the ex parte conference (after it occurred) and in spite of the judge's attempt to preclude any argument. Appellant was not informed of the ex parte conference in advance and had no opportunity to object then. Immediately after the ex parte conference, the judge struck Rep. Frank's entire testimony and cut off appellant's counsel, saying tersely, "There's not going to be any argument about it. That's it." R. 33-116 (App. III at A-70). Nevertheless, appellant registered his "strong objection to the court striking Congressman

mony that Petitioner told the grand jury the truth about his knowledge of the law established Petitioner's veracity and credibility; the unexplained striking of Rep. Frank's entire testimony not only negated but undermined Petitioner's veracity and credibility.

A. The Sixth Amendment Violation Cannot Artificially Be Limited to Only Some of the Counts. Therefore, the Eleventh Circuit Erred in Holding that It "Need Not Reach the Propriety of" Striking the Key Defense Witness's Entire Testimony.

The Eleventh Circuit's distinction on this issue between counts 1, 9, and 10 and the other six counts was artificial and erroneous. Just as the government's improper use of evidence of Petitioner's committee assignments and activities infected all nine perjury counts, so Rep. Frank's factual rebuttal of the government's unconstitutional evidence would have been material to all nine counts. As the grand jury and its foreperson clearly understood, the government used the Speech or Debate Clause evidence to impugn Petitioner's overall credibility, and that affected the indictment on all nine counts. R. 29-108 (App. III at A-68). *See also Beach*, 296 F.2d at 159-160. The Speech or Debate Clause evidence is the evidence to which Rep. Frank was responding. The trial jury would, or at the very least could, have concluded after hearing Rep. Frank's entire testimony that Mr. Swindall had spoken the truth on counts 1, 9, and 10. The jury would then have been disposed to believe Petitioner on the remaining counts. The jury (and Petitioner) never had that opportunity, however, because of the district judge's improper ex parte conference and erroneous striking of Rep. Frank's entire testimony before it was even finished.

Frank's testimony" and his "strenuous objection to that." R. 33-118 (App. III at A-70). Thus, appellant objected both to the ex parte conference and to the result of that conference.

By choosing not to reach the propriety of the unannounced ex parte conference and the striking of Rep. Frank's testimony, 971 F.2d at 1543 n.11, 1550 (App. I at A-23, 39), the Eleventh Circuit has essentially presumed that Rep. Frank's potential additional testimony would have been of no value to Petitioner on the other six counts. That is a presumption the Eleventh Circuit was not free to make. Moreover, the Eleventh Circuit expressly presumed that Rep. Frank was called only "to rebut the inference that he knew the ... money-laundering statutes because of his committee memberships," 971 F.2d at 1541 (App. I at A-18), when in fact Rep. Frank was called for the express purpose of establishing Petitioner's veracity and credibility (elements essential to all nine counts).

B. Under Clear Precedent, Only the Inadmissible Portions of the Testimony (If Any) Should Have Been Stricken, and Stopping and Striking the Entire Testimony of a Key Witness Was Prejudicial Error when the Overwhelming Majority of the Testimony Was Clearly Admissible.

The clear rule is that allegedly improper testimony must be the subject of specific objections to specific questions and answers, and that if any part of the testimony is admissible, it is error to strike the witness's entire testimony. *E.g., United States v. Becktold Co.,* 129 F.2d 473, 480 (9th Cir. 1942); *Arizona Power Corp. v. Smith,* 119 F.2d 888, 890-91 (9th Cir. 1941).

The district judge did not even attempt to make the proper inquiry. Striking Rep. Frank's entire testimony was error and requires reversal on all counts.

C. Under Clear Precedent, the Unannounced Ex Parte Conference and the Interruption and Striking of Key Defense Testimony Violated Petitioner's Sixth Amendment and Due Process Rights on the Remaining Six Counts.

1. Those Actions Clearly Violated Sixth Amendment Rights under This Court's Precedent, and Were Not Harmless Error.

This Court

> has uniformly found constitutional error without any showing of prejudice when counsel was . . . totally absent . . . during a critical stage of the proceeding.

United States v. Cronic, 466 U.S. 648, 659 n.25 (1984). Just as the pretrial identification lineup in *United States v. Wade*, 388 U.S. 218 (1967), was a "critical stage of the proceeding," the ex parte conference in this case, which resulted in the interruption and striking of Petitioner's key witness's testimony, was a "critical stage." The exclusion of Petitioner and his counsel therefore violated his Sixth Amendment rights to have counsel, to confront his accusers, and to present a defense.[5] *See also United States v. Hone,* 456 F.2d 495, 497 (6th Cir. 1972) (inclusion of prosecutors and exclusion of defendant and defense counsel from sentencing meeting created "unnecessary risk that the prosecutors might supply incorrect and unchallenged information which could influence the sentence," and was unconstitutional).

The Sixth Amendment violation was egregious. The government has made no effort to show that it was harmless under this Court's harmless error standard:

> If there is "a reasonable possibility that the evidence complained of might have contributed to the conviction," the error is not harmless. Once a constitutional error is established, there is a presumption of prejudice and the burden is on the beneficiary of the error [the government] to prove beyond a reasonable doubt that

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[5]*See* Davis v. Alaska, 415 U.S. 308, 317 (1974) (jury "entitled to have the benefit of the defense theory before them so that they could make an informed judgment").

the error did not contribute to the verdict. *Hutchins v. Wainwright,* 715 F.2d 512, 517 (11th Cir. 1983) (quoting *Fahy v. Connecticut,* 375 U.S. 85, 86-87 (1963)).

There is no question that, but for the ex parte conference, Rep. Frank's testimony would have stood. First, though the judge later attempted to backtrack, he specifically stated *immediately after* the unannounced ex parte conference that he based his ruling on what the government had told him out of appellant's presence:

> The government said they had a document that indicated that Petitioner co-authored in the Judiciary Committee the money laundering bill. That's what they told me in camera, the government. And I don't know what you know about it.
>
> But, in any event, if we get into that, it's gone. So I'm not going to let you do it. I'm not going to let you cross-examine Congressman Frank. I'm going to strike his testimony.

R. 33-116 (App. III at A-69).

Second, Petitioner pointed out to the judge that if he had not been excluded from the ex parte conference, he could have refuted the government's representations in that conference that served as the basis for the court's striking the key testimony. R. 33-122, 123 (App. III at A-70).

2. The Appropriate Remedy for a Sixth Amendment Violation Is Reversal on All Counts, Not Just on a Limited Number of Counts.

When the government violates the Sixth Amendment in securing a conviction, the court cannot parse the counts of the indictment to separate "affected" counts from "unaffected" counts -- all counts are necessarily affected, particularly where, as here, all counts relate to the same transaction and the violation occurs at

the trial of all counts. Where Sixth Amendment rights are violated, a defendant convicted of more than one offense is entitled to reversal of *all* of those convictions. *See, Davis,* 415 U.S. 308 (burglary and grand larceny); *Wade,* 388 U.S. at 220, 243 (bank robbery and conspiracy). The Eleventh Circuit erred in not reversing the convictions as to all nine counts in this case.

3. The Ex Parte Conference Did Affect the Fairness of the Trial; the Eleventh Circuit's Reliance on Walsh Was Misplaced.

The Eleventh Circuit relied exclusively on *United States v. Walsh,* 700 F.2d 846 (2d Cir. 1983), for its conclusion that the ex parte conference did not affect the fairness of the trial. The circumstances of the ex parte conference in *Walsh* could not be more different from those in this case. In *Walsh,* the ex parte conference consisted of a request by the prosecution for a ruling on whether certain evidence would have to be disclosed as *Brady* material prior to use at trial. When the court ruled that the evidence would have to be disclosed, the evidence was not used. There was clearly no prejudice to the defendant from evidence that was not used.

Here, not only was the government erroneously allowed to use unconstitutional evidence in its case, but also the direct result of the improper ex parte conference was the striking of the defense's key testimony that refuted the unconstitutional evidence and that was undeniably admissible in large part. It simply cannot be said that the interruption and striking of key defense testimony did not affect the fairness of the trial.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue.

Date: September 7, 1993.

Respectfully submitted,

ROBERT FIERER
152 Nassau Street, N.W.
Atlanta, Georgia 30303
(404) 688-5500

WENDELL R. BIRD*
DAVID J. MYERS
Bird & Associates
1150 Monarch Plaza
3414 Peachtree Road, N.E.
Atlanta, Georgia 30326
(404) 264-9400

*Counsel of Record for
Petitioner

APPENDIX

APPENDIX

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APPENDIX I

UNITED STATES OF AMERICA, Plaintiff-Appellee,

versus PATRICK L. SWINDALL, Defendant-Appellant.

Nos. 89-8746, 91-8329, 91-9017

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

August 31, 1992, Decided

August 31, 1992, Filed

Before KRAVITCH, Circuit Judge, GODBOLD and JOHNSON *, Senior Circuit Judges.

* See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

OPINIONBY: KRAVITCH

OPINION: [*1534] KRAVITCH, Circuit Judge:

A Northern District of Georgia jury convicted Patrick L. Swindall ("Swindall"), a former member of the U.S. House of Representatives, on nine counts of making false material declarations before a grand jury, in violation of 18 U.S.C. § 1623.[1] In essence, the indictment charged that Swindall had discussed mon-

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[1]18 U.S.C. § 1623 provides, in part: "Whoever under oath ... in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration ... shall be fined not more than $ 10,000 or imprisoned not more than five years, or both."

ey-laundering transactions with an undercover agent and an intermediary, and then falsely testified to a grand jury to conceal the extent of his involvement in these discussions. Swindall was not charged with any substantive money-laundering offenses. The district court sentenced Swindall to a concurrent twelve-month sentence on each count and imposed a fine of $ 30,000.

In the first of three consolidated appeals, Swindall argues a number of grounds for reversal of his convictions. Swindall first contends that his Speech or Debate Clause privilege was violated when (a) the government, to establish that Swindall had knowledge of statutes that would have informed him of the illegality of the money-laundering transactions, questioned him before the grand jury about his memberships on the Banking and Judiciary Committees of the U.S. House of Representatives; (b) he was indicted on the basis of evidence of these committee memberships; (c) he was convicted on the basis of the same information; and (d) he was convicted on the basis of committee reports introduced by the government at trial. Second, Swindall contends that an ex parte conference between the prosecutor and the district judge violated Swindall's Fifth and Sixth Amendment rights. Third, Swindall argues that the district court improperly struck the testimony of defense witness Congressman Barney Frank ("Representative Frank"). Fourth, Swindall claims that his right
against self-incrimination was violated when the prosecution improperly commented to the jury regarding Swindall's decision not to testify at trial.

Finally, Swindall claims that the elements of perjury were not

present because his declarations to the grand jury were (1) literally true, (2) in response to fundamentally ambiguous questions, and (3) not material to the grand jury's investigation.[2]

We reverse Swindall's convictions on Counts One, Nine, and Ten because of violations of his Speech or Debate privilege, and instruct the district court on remand to vacate the convictions and to dismiss these counts with prejudice. We affirm Swindall's convictions on the remaining six counts.

In both the second and third appeals consolidated here, Swindall argues that he [*1535] is entitled to either dismissal of the indictment or a new trial because of newly discovered evidence and governmental misconduct. The district court denied Swindall's motions for dismissal or new trial, and we affirm.

BACKGROUND

A. Background Relevant to the First Appeal

In 1987, the Internal Revenue Service's Criminal Investigation Division was conducting an investigation, called Operation Boots, of money-laundering activities throughout the nation. In one facet of the investigation, undercover agent Mike Mullaney ("Agent Mul-

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[2]Appellant also raises the following claims, which we reject without discussion: the district court committed reversible error by erroneously admitting co-conspirator hearsay statements under Fed.R.Evid. 801(D)(2)(e) in the absence of a finding that the government established the existence of a conspiracy; Swindall's right to due process was violated when he was compelled to use a peremptory strike to disqualify a biased juror; his right to a fair trial was denied because the trial court was biased in favor of the prosecution; his right to a fair trial was denied because the prosecution engaged in misconduct; and the denial of a bill of particulars violated Fed.R.Crim.P. 7(f).

laney") was posing as Mike Martinez, a representative of Colombian drug dealers. Agent Mullaney began to launder money through Charles LeChasney ("LeChasney") and others.

Swindall, who knew LeChasney from various Republican Party fund-raising events, believed him to be a wealthy financial consultant, not the least because LeChasney lived in an historic mansion in an affluent section of Atlanta and appeared to own a fleet of antique and luxury cars. In fact, he was a bankrupt con artist whose fraudulent schemes had left a trail of victims.

LeChasney, who was himself under investigation and who was later arrested and convicted, was not cooperating with the government and was unaware that the person he knew as Mike Martinez was in fact undercover agent Mike Mullaney.

In mid-1987, Swindall asked LeChasney for financial advice concerning a million-dollar note he held, which matured in four years and was earning eight-percent interest. The note represented part of the proceeds of the sale of commercial real estate in downtown Atlanta. Swindall, who was in need of funds to pay for cost overruns on a home he was having built, wanted to sell the note or use it to obtain a loan, whichever generated the most favorable tax consequences. LeChasney informed Swindall that he knew of investors who might be willing to buy the note, but who would pay only in cash. He explained that the cash was "flight capital" smuggled from Central American countries by refugees fleeing oppression, and that the investors needed to hide their assets and conceal their identities to protect themselves from the governments of these countries.

According to the government, Swindall was aware of two particular money-laundering statutes because of his membership on the

House Banking and Judiciary Committees. One statute prohibited laundering funds that are the proceeds of unlawful activities such as selling drugs.[3] The other statute, enacted in response to money launderers who engaged in transactions of less than $ 10,000 to avoid triggering reporting requirements, prohibited structuring a transaction to cause a financial institution not to file a report that would otherwise be required.[4] Both bills were part of the Anti-Drug Abuse Act of 1986 and each was considered by either

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[3]18 U.S.C. § 1956 ("Laundering of monetary instruments") provides in part that it is a violation of the law for someone:

(a)(1) knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity -- ...

(B) knowing that the transaction is designed in whole or in part--

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law....

[4]31 U.S.C. § 5324 ("Structuring transactions to evade reporting requirements prohibited") provides: No person shall for the purpose of evading the reporting requirements of section 5313(a) [reporting-requirement statute] with respect to such transaction– (1) cause or attempt to cause a domestic financial institution to fail to file a report required under section 5313(a); (2) cause or attempt to cause a domestic financial institution to file a report required under section 5313(a) that contains a material omission or misstatement of fact; or (3) structure or assist in structuring or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

the Banking or [*1536] Judiciary Committee during Swindall's tenure in Congress.

In July 1987, LeChasney reported to Agent Mullaney that Swindall wanted to sell a million-dollar note and, according to LeChasney, was interested in selling it offshore to evade taxes. Agent Mullaney reported this information to superiors, who opened a tax-evasion and currency-reporting investigation of Swindall.

1. The Marriott Meeting

On August 28, 1987, Swindall, LeChasney, and Agent Mullaney met at the Marriott Hotel in Atlanta. The government secretly videotaped the meeting.

Swindall told Agent Mullaney that, because of changes in the tax laws, he was no longer interested in selling the note, but he was interested in obtaining a loan. Agent Mullaney – mentioning nothing about Colombian drug dealers – told Swindall that he represented South American investors who wished to dispose of cash, hide their assets, and conceal their identities. He informed Swindall that any deal would be in cash.

Swindall stated that he was interested in a mortgage loan and suggested a scheme whereby LeChasney would form a mortgage company, secretly funded by the agent's investors, that would lend Swindall money. Swindall would sign the million-dollar note over to LeChasney's newly formed corporation, which the agent's investors would eventually purchase. The advantages of this scheme included that (1) Swindall could have use of the money without realizing an immediately taxable gain from sale of the note; (2) the investors could anonymously dispose of their cash; and (3) Swindall could point to LeChasney's corporation as the source of the loan and deny

that he had ever made a deal with Agent Mullaney.

Although the deal would be made to appear to be a mortgage loan from LeChasney to Swindall, Swindall and the undercover agent negotiated the price of the actual deal -- a sale of the note for cash. They discussed a price in the range of $ 850,000, which was $ 80,000 higher than the present value of the note.

Swindall asked why he could not simply deposit the cash in a bank in one lump sum. Agent Mullaney explained that currency transaction report forms ("CTRs" or "bank forms") would require, inter alia, that Swindall reveal the source of the funds, which would be unacceptable to the agent's investors. It was therefore imperative that the bank forms either not be filed or be filed falsely.

LeChasney – who was to receive a large commission from the deal – informed Swindall that it would take him at least three weeks to convert such a large amount of cash into cashier's checks without triggering the currency-reporting requirements. No agreement was reached because, among other reasons, Swindall refused to accept delivery of the cash personally, and neither Swindall nor the undercover agent was willing to assume the risk of loss during the three weeks required to convert the cash into cashier's checks.

2. Further Discussions

The government then closed its investigation of Swindall as he had not indicated an intention to evade his taxes. On September 3, however, the government reopened the investigation, this time with regard to money-laundering and transaction-structuring violations, because LeChasney had advised Agent Mullaney that Swindall was now willing to accept the cash personally. LeChasney informed the agent that Swindall was in immediate need of $ 100,000 because of

the cost overruns on his home. Swindall's increasingly pressing need for funds eventually resulted in the inclusion of an advance payment of $ 150,000 in the proposed deal.

During the course of negotiations, Agent Mullaney spoke several times on the telephone with LeChasney and occasionally with Swindall. The agent recorded these conversations. On September 7, Swindall related to the agent his fear that the cash came from drug sales. The agent responded that he had been told the cash was flight capital, but that he could not guarantee the source. He told Swindall that "the specter of drugs is there," but that he personally was not involved in selling [*1537] drugs. The agent also told Swindall that "some of the manipulations ... with the cash may well be illegal in and of themselves," especially in light of the reporting requirements for transactions in excess of $ 10,000. Swindall stated that it was his position that he would be borrowing money from LeChasney and he had no knowledge or interest in how LeChasney obtained his funds. In other words, Swindall was protected because he could deposit checks from LeChasney's corporation and, when depositing them, truthfully state their direct source. As part of the actual deal, however, Swindall agreed to accept delivery of the cash and to tender a secret document acknowledging his assignment of the note to Agent Mullaney. The parties agreed that Swindall would sign this document in the agent's presence.

Agent Mullaney testified that up until that point, his ability to inform Swindall that the cash came from illegal sources was hampered by LeChasney's attempts to mislead Swindall about the legality of the deal. While the agent's objective was to investi-

gate whether Swindall was willing to participate in money-laundering transactions, LeChasney was eager, if not desperate, to receive the sizeable commission that would come from the completed deal. The agent testified that he wanted to inform Swindall of the source of the funds at their next face-to-face meeting, with LeChasney present, so that LeChasney could not continue falsely to assure Swindall that the cash was flight capital.

Throughout the later negotiations, as Swindall stated that he could not directly participate in a deal involving the proceeds of drug sales, LeChasney continued to assure him that the money was clean, while the undercover agent continued to state, with widely varying degrees of certainty, that drugs were probably involved.

3. The Greenbriar Meeting

On September 13, Swindall and LeChasney met Agent Mullaney at the Greenbriar Resort in White Sulphur Springs, West Virginia, the site of a Congressional golf tournament. Their conversation was secretly recorded by the agent. Discussing the process by which LeChasney would convert the cash into cashier's checks, the agent asked LeChasney whether he intended to "stay under the ten thousand dollars," which would circumvent the requirement that CTRs be filed. Swindall added, "I assume you are, aren't you, Charles?"

Swindall asked the agent if the source of the cash was drug money. The agent told Swindall that it was his "gut feeling" that "there are narcotics dollars in there." He told Swindall that the money was not flight capital and that in the past he had laundered cash from such illegal activities as skimming profits from casinos. Swindall assured the agent that "anything you tell me is told in total confidence from this point forward." During a discussion of

the risk the Congressman was taking, Swindall stated that "there's no question in this transaction that I am basically using Charles as my buffer," and "where Charles gets his money is his business, his problem." Swindall stated that he was still undecided about the deal and that he wanted to "sleep on it."

4. Further Negotiations and Swindall's Eventual Rejection of the Deal

On September 18, Agent Mullaney advised LeChasney that he would deliver $ 150,000 in advance, and the balance directly to Swindall at the time the note was transferred. The agent insisted that he receive a handwritten note from Swindall acknowledging that Swindall had received the $ 150,000 from the agent himself and not from LeChasney's buffer corporation.

Because Agent Mullaney's superiors ordered him to delay delivery of the advance payment, LeChasney, still eager to receive his commission, agreed to advance Swindall the $ 150,000. In fact, LeChasney did not have $ 150,000. He was able, however, to present Swindall with a check in that amount drawn from the escrow account of his attorney, Douglas Daum ("Daum"). LeChasney, with the aid of an accomplice at Dean Witter, falsely represented to Daum that he had enough money in a Dean Witter account to cover the check. LeChasney [*1538] meanwhile had incorporated the buffer corporation, called the Gulf Coast Mortgage Company. The government introduced evidence that the $ 150,000 check was part of the larger deal. The defense contended that this was a truly separate loan agreement between LeChasney and Swindall and that LeChasney would be reimbursed by Agent Mullaney only if Swindall and the agent came to an agreement.

On Friday, September 25, Swindall received the check at Daum's

office. Swindall signed a document evidencing his receipt of the check, but the document acknowledged only LeChasney's corporation, not the undercover agent. Swindall assigned in writing $ 150,000 of his million-dollar note to LeChasney's corporation "as an advance upon a real estate loan upon my residence ... the total amount of the loan to be ... $ 850,000." Swindall then delivered the check to the builder of his home.

Swindall and Agent Mullaney had agreed to meet that weekend for delivery of the cash. On Saturday evening, however, Swindall called the agent to inform him that he was not going forward with the transaction because of the potential liability. They spoke again later in the evening in an unsuccessful attempt to save the deal. Swindall told the agent, "The only reason I can't [sign the note acknowledging the cash from the agent] is I would be essentially laundering y'all's money, which I can't do. In other words, if Charles wants to launder y'all's money, fine. But I can't do that."

Although Swindall argues that the $ 150,000 check "had nothing to do" with the larger transaction, once the deal with Agent Mullaney fell through, (1) Swindall called the builder and told him not to deposit the check; (2) Swindall returned the check to Daum; (3) LeChasney returned Swindall's note; and (4) Daum and LeChasney stopped payment on their respective checks. The IRS closed the investigation against Swindall. LeChasney, however, attempted unsuccessfully during the next few weeks to resuscitate the deal.

5. Swindall's Grand Jury Appearance and Resulting Indictment

In January 1988, the government indicted and arrested LeChasney for money-laundering. On January 28, after learning of LeChasney's arrest, Swindall contacted the U.S. Attorney's Office in Atlanta

and asked to speak with someone regarding his financial dealings with LeChasney. Two IRS agents visited Swindall at his home that night and took a statement. On February 2, 1988, Swindall appeared before a federal grand jury investigating money-laundering activities.

The government informed Swindall that he was a subject, not a target, of the investigation. According to the government, Swindall perjured himself before the grand jury to conceal the extent of his involvement in discussions about illegal money-laundering transactions.

The grand jury returned a ten-count perjury indictment against Swindall on October 17, 1988. In brief, the indictment charged that Swindall made the following false statements that were material to the grand-jury investigation: he stated that during negotiations with the undercover agent, he had never satisfied himself as to the "criminality" of the proposed transactions, and that he did not recall being told that LeChasney's conversion of the money would violate federal currency reporting requirements (Count One); he stated that he did not recall discussions about being insulated by LeChasney from the source of the undercover agent's money (Count Two); he stated that he walked away from the deal on September 13, 1987, after the Greenbriar meeting, when in fact he continued negotiating until the end of September (Count Three); he stated that he did not recall being told by the undercover agent that the source of the cash was drug-sale proceeds (Count Five); he stated that "every time I talked with Mike [Agent Mullaney], I was insisting that the money be delivered without my being present" (Count Six); he stated that the $150,000 check he received from LeChasney "had nothing to do with" the larger, $850,000 transaction with the

undercover agent (Count Seven); he stated that he had given the $150,000 check to his secretary and [*1539] instructed her not to deposit it, when in fact he had delivered the check to the builder of his home (Count Eight); he stated that he did not recall conversations about avoiding filing bank forms (Count Nine); and finally, he stated that he did not recall being informed by the undercover agent that the agent's investors were engaging in the transaction to "wash" or "launder" cash (Count Ten).

A first trial – scheduled at Swindall's request for October 1988 to give him a chance to retain his seat in the House by winning acquittal before Election Day – was aborted stemming from charges that Swindall had mailed to potential jurors campaign literature claiming that he had passed a lie detector test concerning the perjury charges. Swindall lost his campaign for reelection and went to trial in May 1989. During the trial, the district court dismissed Count Four of the indictment. A jury found Swindall guilty on all the remaining counts. Swindall filed a timely notice of appeal.

B. Background Relevant to the Second and Third Appeals

1. Second Appeal

While his direct appeal was pending, Swindall filed motions in the district court asking for either dismissal of the indictment on the ground of governmental misconduct or a new trial on the basis of newly discovered evidence. The district court, after holding an evidentiary hearing, denied Swindall's motion. Swindall filed a timely notice of appeal.

2. Third Appeal

In July 1991, Swindall filed another motion seeking a new trial or dismissal of the indictment, claiming additional newly discov-

ered evidence and again alleging governmental misconduct. The district court denied Swindall's motion, and Swindall filed a timely notice of appeal. This court ordered the three appeals consolidated.

DISCUSSION

I. Speech or Debate Clause and Related Claims

A. Procedural Background

Before trial, Swindall moved to have the indictment dismissed because, inter alia, he was questioned by the Assistant U.S. Attorney ("AUSA") before the grand jury in violation of the Speech or Debate Clause.[5] In the grand jury proceeding, the AUSA sought to establish, by questioning Swindall, that because of his memberships on the House Banking and Judiciary Committees, Swindall had knowledge of the money-laundering and transaction-structuring statutes.[6] The government later used the inference that Swindall knew the contents of the statutes to show that the Congressman (1) lied when he told the grand jury that he was not convinced of the criminality of the proposed transactions and (2) had a motive to lie when he stated that he could not recall whether conduct violating the statutes had been discussed.

Examples of the AUSA's questioning of Swindall included the following:

Mr. Swindall, particularly being a member of the Banking Committee, I'm sure you're aware of the recent amendments to Title 31

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[5]For any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place. U.S. Const. art. I, § 6, cl. 2.

[6]Unless otherwise indicated, we will refer to the two statutes together as "the money-laundering statutes."

which have to do with the structuring violations ... which deal with the specific issue of people structuring financial transactions underneath ten thousand dollars so they can -- they [can] avoid those sorts of things.

* * * * * *

Q. Now, in your capacity on the Banking Committee, which has to do with banking regulations and the filing of forms, you are aware that one of the reasons why we have that law is to find out about all this cash that floats in --

A. That's correct.

Q. -- from people that are engaged in narcotics trafficking?

[*1540] A. That is correct.

Q. Now, I assume that you had that knowledge when you met with them in August, at least that general knowledge?

A. I did.

Q. Now, with that knowledge in mind, you're telling us that what you were going to say was that you were going to take the money and say that the source of the money was something other than what it was?

* * * * * *

Mr. Swindall, and I don't mean to sound facetious, but you're telling us that as a member of the Banking Committee and as a member of Congress who, I would assume, and I don't even know how you voted on this issue, but I would assume you voted for the passage of this act, and you were on the -- specifically on the Banking Committee, and you're telling the grand jury now that you didn't even know it was in existence until Friday?

None of the ten counts of the indictment referred directly to Swindall's committee memberships, however. The magistrate judge

recommended that the motion to dismiss the indictment be denied but that the government be prohibited from introducing evidence at trial mentioning the defendant's committee memberships.

In its Objections to the Magistrate's Report and Recommendation ("Government's Objections to Magistrate's Report"), the government stated that it sought to "introduce evidence that the Defendant was a member of the Judiciary and the Banking Committees and that money laundering statutes, specifically, the 1986 amendments, were matters addressed by those committees."

The government urged that: it is critical to the prosecution of the case by the United States that this evidence be provided to the jury. The undercover operation of this investigation involved the Defendant's conversations about circumvention of bank forms and violation of federal currency laws. Unlike any other citizen in the United States, the Defendant would have a unique and specific knowledge in the understanding of the illegality of the circumvention of the currency transaction reports because of his former status as a member of the House Judiciary and Banking Committee. (Emphasis added.)

The district court affirmed the magistrate judge's recommendation to deny the motion to dismiss the indictment but overruled the magistrate judge on the evidentiary issue, holding that evidence of Swindall's membership on the House Banking and Judiciary Committees could be admitted at trial, with certain restrictions on both the prosecution and the defense's use of other legislative evidence. The district court permitted the government to argue the inference that Swindall had knowledge of the bills' contents because of his committee memberships.

Swindall did not immediately appeal from the portion of the

pretrial order denying his motion to dismiss the indictment, although such an appeal was available. See Helstoski v. Meanor, 442 U.S. 500, 506, 99 S. Ct. 2445, 2448, 61 L. Ed. 2d 30 (1979). Swindall did, however, make a standing objection, on Speech or Debate grounds, to all reference by the prosecution to his committee memberships and other legislative activities.

At trial, the government referred to Swindall's committee memberships in both its opening and closing statements and introduced the Report of the House Judiciary Committee on the Money Laundering Control Act of 1986[7] and the Report of the Committee on Banking, Finance, and Urban Affairs to the Comprehensive Money Laundering Prevention Act.[8] The government also introduced pages from the Congressional Record indicating that Swindall served on the Judiciary Committee from 1985 to 1988 and the Banking Committee from 1987 to 1988. According to the Government's Response to Defendant's [*1541] Motion for a New Trial Based on Newly Discovered Evidence:

The purpose of the introduction of the Defendant's committee memberships was to establish that he was a member of the Judiciary Committee during the passage of the Money Laundering Control Act of 1986, which ... generally prohibited the laundering of funds which were the proceeds of unlawful activity such as drug dealing. The purpose of the introduction of the Defendant's membership on the House Banking Committee ... was to show that the Committee had jurisdiction over relevant laws which ... address the illegality of

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[7]H.R.Rep. No. 855, 99th Cong., 2d Sess. (1986).

[8]H.R.Rep. No. 746, 99th Cong., 2d Sess. (1986). The government argues that Swindall waived his objection to the introduction of the committee reports.

structuring cash deposits or cash transactions in order to circumvent the filing of a currency transaction report.

To rebut the inference that he knew the details of the 1986 money-laundering statutes because of his committee memberships, Swindall called Representative Frank to testify. The district court's pretrial order prohibiting Swindall from introducing evidence of legislative acts stated that he could introduce instead "evidence of the number of bills before these committees and then argue that it is not reasonable to infer that a congressman is intimately aware of every bill before his committee."

Representative Frank's testimony contained a discussion of the legislative history of the Money Laundering Control Act of 1986. He stated that although the Judiciary Committee worked on the measure, the anti-structuring provisions were not in the Judiciary Committee's version of the act. At the time, Swindall was not yet on the Banking Committee. Frank explained that members of the House of Representatives tend to specialize and often trust the judgment of colleagues about the contents of noncontroversial bills. He stated that a typical Representative might know the contents of less than ten percent of the bills considered by the House.

The prosecutor then asked for a recess, and engaged in an unannounced but recorded ex parte conference with the judge in chambers. At the conference, the prosecutor warned that if the court allowed Frank to continue to testify in this vein, the government would be forced to introduce "devastating" evidence that, far from delegating consideration of the money-laundering bills to others, Swindall actually "signed on as a co-author of the very bill that

we are investigating in this case."[9]

When court reconvened, the judge stated that he had held an ex parte conference with the prosecutor concerning evidence that the government might proffer and that, to protect Swindall's Speech or Debate privilege, he was ordering the entirety of Frank's testimony stricken. Later, the judge clarified his ruling, stating that he was striking Frank's testimony because it had gone farther than allowed by the pretrial order, and that his decision was unrelated to the information he received in the ex parte conference.

Finally, the prosecutor told the jury in his closing statement:

So when he went in the grand jury he knew the importance of the forms. He knew how important that was to the grand jury's investigation because he said he had specifically read that. He knew the importance of those forms. But yet, even with that in his mind, and he had to think about it all weekend, he still goes in there and says, "Well, Greenbriar, no, we didn't discuss the forms." Why did he have such a faulty memory about that? Because he knew that was the focus or one of the focuses of the grand jury's investigation. The forms....

And he also, I'm reminded by Mr. Swindall, was on the banking and the judiciary committee, the very committees that had jurisdiction over these two laws. There are about 240 million Americans. 435 of them are in Congress. And the documents will go out with you. Do you [*1542] know how many of them on the Republican side

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[9]Swindall argues that the prosecutor misled the district court during the conference because the bill in question neither became law nor contained a structuring provision, and was co-sponsored, not co-authored, by Swindall. The government counters that although the bill did not become law, it was the predecessor to the bill that eventually was passed.

are on both the Judiciary and the Banking Committees at that time in the One-Hundredth Congress? Two; two.

And yet he would have you believe he was not aware of the law. Who then will we hold accountable to the law? Who then stands before the law, if not a man that's a lawyer, a congressman on those committees, and only two Republican congressmen on both of those committees. But yet he did not know.

B. Counts Affected by the Speech or Debate Claims

In our view, Swindall's Speech or Debate claims affect only Counts One, Nine, and Ten. Only with respect to these counts did the government use evidence of Swindall's committee memberships to show that he had "unique and specific knowledge"[10] of the illegality of (1) structuring transactions to avoid reporting requirements in violation of 31 U.S.C. § 5324, or (2) knowingly engaging in financial transactions that conceal the source of the proceeds of illegal activity in violation of 18 U.S.C. § 1956. The government used evidence of this knowledge to prove that Swindall lied when he told the grand jury that he was not convinced of the criminality of the proposed transactions and to show that Swindall had a motive to lie when he stated that he could not recall whether conduct that violated these two statutes had been discussed.

Count One charged that Swindall committed perjury "to conceal from the grand jury the nature and scope of his knowledge that the alleged conduct of Mike Martinez (Agent Mullaney) and the proposed laundering of the $ 850,000 in cash by Charles LeChasney, was ille-

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[10]See Government's Objections to Magistrate's Report, supra.

gal conduct." (Emphasis added.) According to the government's argument at trial, because Swindall was aware of the contents of the two money-laundering statutes, he lied when he stated that "I never satisfied myself of anything with respect to criminality."

Count Nine charged that Swindall, "understanding that the bank forms (CTR) are important tools in tracking and tracing the flow of cash into financial institutions," testified falsely that he did not recall discussing with LeChasney and Agent Mullaney why bank forms should not be filed. (Emphasis added.) According to the government's argument at trial, Swindall's knowledge that 31 U.S.C. § 5324 prohibited structuring transactions to avoid bank-form reporting requirements gave him the motive to lie about his recollection.

Count Ten charged that Swindall testified falsely that he did not recall being told why Agent Mullaney's investors were dealing in cash. According to the government's argument at trial, Swindall's knowledge that 18 U.S.C. § 1956 prohibited participating in laundering the proceeds of unlawful activity gave him the motive to lie about his recollection.

The remaining counts are unaffected by Swindall's Speech or Debate claims because the government did not attempt to prove Swindall's "unique and specific knowledge" of the specific contents of 31 U.S.C. § 5324 or 18 U.S.C. § 1956 to give him a motive to lie. Count Five, for instance, alleged that Swindall falsely stated that he did not recall being informed by Agent Mullaney that the agent had in the past violated the laws of the United States. This count did not allege that Swindall lied about whether he knew of the illegality of such activity. Nor did it depend on Swindall's knowledge of the contents of the two money-laundering statutes to

give him a motive to lie. The agent's statement itself provided Swindall with the knowledge of illegality to have a motive to lie about his memory of the conversation.

Count One is the only count in which Swindall stated that he did not know that the transactions were illegal. Count Nine and Ten are the only counts in which Swindall's knowledge of the specific contents of the two money-laundering statutes gave him a motive to lie in response to such otherwise seemingly innocuous questions [*1543] as "Did you discuss the need to file bank forms?" and "Did you discuss why the investors were dealing in cash?" Only someone with knowledge of the money-laundering statutes would know why truthful answers to these questions would expose him to liability. In none of the remaining counts – concerning such matters as whether Swindall walked away from the deal, how close he came to an agreement, or whether he discussed using LeChasney to shield him from liability – was it relevant that he had knowledge that, specifically, transaction-structuring and laundering the proceeds of unlawful activity violated the law.

C. Speech or Debate Clause Analysis

Swindall argues that the district court erred in (1) refusing to dismiss the indictment and (2) admitting into evidence Swindall's committee memberships and reports issued by those committees. He contends that the remedy for these violations is dismissal of the indictment or, in the alternative, a new trial. In other claims connected to the Speech or Debate issue, Swindall contends that the district court committed reversible error by limiting on Speech or Debate grounds the evidence the defense could present; holding an unannounced ex parte conference with the prosecutor; and striking

the testimony of Representative Frank. [11]

The government urges that because inquiry was merely made into Swindall's legislative status, not his legislative acts, the Speech or Debate privilege was not violated. Alternatively, the government contends that if the privilege was violated, dismissal is not the proper remedy because the indictment was facially valid. Review of Swindall's Speech or Debate claims is de novo.

We hold that (1) the AUSA's questioning of Swindall before the grand jury about his committee memberships violated the Speech or Debate clause; (2) it was error to allow reference to be made to Swindall's committee memberships both in the grand jury proceeding and at trial;[12] and (3) the remedy for the violations of the privilege is dismissal of the affected counts.[13]

There are two reasons why the Speech or Debate Clause prohibits inquiry into a member of Congress's committee assignments even if the member's specific legislative acts are not mentioned. First, our review of Supreme Court precedent convinces us that the privilege protects legislative status as well as legislative acts. Second, here the government's inquiry into Swindall's committee memberships actually amounted to an inquiry into legislative acts. The government was allowed to argue a permissive inference that Swin-

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[11]For the reasons stated below, we do not reach these three claims.

[12]Because we reverse the convictions on the affected counts based on the inquiry into Swindall's committee memberships, we need not decide the procedural question of whether Swindall properly objected to the introduction of the committee reports. We note, however, that it is well established that committee reports are protected by the Speech or Debate privilege. See, e.g., Hutchinson v. Proxmire, 443 U.S. 111, 124-25, 99 S. Ct. 2675, 2683, 61 L. Ed. 2d 411 (1979).

[13]Our discussion will focus on the indictment, but we will also refer to the trial when useful to clarify a point.

dall knew the details of the money-laundering statutes because of his status as a member of the Banking and Judiciary Committees. If the inference is drawn that Swindall acquired knowledge of the statutes through his committee memberships, one sees that Swindall could have acquired such knowledge only by performing a legislative act such as reading a committee report or talking to a member of his staff.

Article I, section 6 of the U.S. Constitution provides that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." Explaining the rationale for the privilege, the Supreme Court has stated that "since the Glorious Revolution in Britain, and throughout United States history, the [legislative] privilege has been recognized as an important protection of the independence and integrity of the legislature. In the American governmental [*1544] structure the clause serves the additional function of reinforcing the separation of powers so deliberately established by the Founders." United States v. Johnson, 383 U.S. 169, 178, 86 S. Ct. 749, 754, 15 L. Ed. 2d 681 (1966). "The central role of the Speech or Debate Clause [is] to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary." Gravel v. United States, 408 U.S. 606, 617, 92 S. Ct. 2614, 2623, 33 L. Ed. 2d 583 (1972) (citing Johnson, 383 U.S. at 181, 86 S. Ct. at 755).

The Speech or Debate Clause "at the very least protects [a member of Congress] from criminal or civil liability and from questioning elsewhere than in [Congress]." Gravel, 408 U.S. at 2615, 92 S. Ct. at 2622. The clause gives members of Congress two distinct privileges: (1) freedom from questioning, which is in the nature of

a testimonial privilege, and (2) freedom from liability, which means that reference may not be made in court to a defendant's legislative activities.[14] Protection from criminal liability includes protection from prosecution, not merely from conviction. See United States v. Helstoski (Helstoski I), 442 U.S. 477, 488, 99 S. Ct. 2432, 2439, 61 L. Ed. 2d 12 (1979).

The clause is read broadly to effectuate its purposes. See Eastland v. United States Servicemen's Fund, 421 U.S. 491, 501, 95 S. Ct. 1813, 1820, 44 L. Ed. 2d 324 (1975). Legislative activities covered by the privilege include issuing committee reports and holding hearings, see Doe v. McMillan, 412 U.S. 306, 93 S. Ct. 2018, 36 L. Ed. 2d 912 (1973), as well as "those things generally said or done in the House or the Senate in the performance of official duties." United States v. Brewster, 408 U.S. 501, 512, 92 S. Ct. 2531, 2537, 33 L. Ed. 2d 507 (1972) (emphasis added).

D. The Speech or Debate Clause and Legislative Status

In other cases in which courts have interpreted the scope of the Speech or Debate Clause, the issue generally has been whether the activity the legislator wishes to shield from scrutiny is truly a legislative activity or is instead "casually or incidentally related to legislative affairs but not a part of the legislative process itself." Id. at 528, 92 S. Ct. at 2545.

Insofar as the Clause is construed to reach other matters [than pure speech or debate], they must be an integral part of the delib-

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[14]The freedom from liability is derived from the freedom from questioning: "Revealing information as to a legislative act – speaking or debating – to a jury would subject a Member to being 'questioned' in a place other than the House or Senate." United States v. Helstoski (Helstoski I), 442 U.S. 477, 490, 99 S. Ct. 2432, 2440, 61 L. Ed. 2d 12 (1979).

erative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.

Gravel, 408 U.S. at 626, 92 S. Ct. at 2627. In Brewster, for example, the Supreme Court held that inquiry into the defendant's agreement to take a bribe in exchange for his vote was not prohibited by the Speech or Debate Clause because bribe taking obviously is not related to legislative activities.

Brewster, 408 U.S. at 528, 92 S. Ct. at 2545. In Gravel, the Court held that members' lobbying of executive branch officials -- even though generally done -- was not protected because such activity was "beyond the legislative sphere." Gravel, 408 U.S. at 625-26, 92 S. Ct. at 2627. See Johnson, 383 U.S. at 172, 86 S. Ct. at 751.

Here, there is no contention that the subject of the inquiry -- Swindall's memberships on the House Banking and Judiciary Committees -- is "beyond the legislative sphere." The question instead is whether evidence of a legislator's status as a member of a particular committee is, like evidence of his or her legislative acts, protected by the privilege.

The government argues that inquiry confined to whether a legislator was a member of a committee does not violate the privilege because it does not call into question a specific legislative act, speech, or vote. A [*1545] close examination of what the privilege is supposed to protect, however, demonstrates why a legislator's committee membership may not be the subject of inquiry.

In Gravel, the Supreme Court stated that "the Speech or Debate

Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch. It thus protects Members against prosecutions that directly impinge upon or threaten the legislative process." Gravel, 408 U.S. at 616, 92 S. Ct. at 2622 (emphasis added). The Court also noted that "the courts have extended the privilege to matters beyond pure speech or debate in either House, but 'only when necessary to prevent indirect impairment of such deliberations.'" Id. at 625, 92 S. Ct. at 2627 (quoting United States v. Doe, 455 F.2d 753, 760 (1st Cir.1972)) (emphasis added).

Nowhere does the Gravel Court draw a distinction between "activity" and "status," nor does such a distinction appear to have significance. The Court's reference to "matters" beyond pure speech and debate seems to indicate that, within "the legislative sphere," the Court was not concerned about differentiating between the constituent elements of the legislative process. Rather than calling for a distinction between "status" and "activity," Supreme Court precedent directs us to ask: does inquiry into a legislator's committee memberships directly impinge on or threaten the legislative process? 408 U.S. at 625, 92 S. Ct. at 2627. Does it make legislators accountable before a possibly hostile judiciary? See id. at 617, 92 S. Ct. at 2623. And does it indirectly impair legislative deliberations ? Id. at 625, 92 S. Ct. at 2627. The answer to each of these questions is yes.

The government argued at trial that introducing evidence of Swindall's committee memberships was "critical" to its perjury case. It seems obvious that levying criminal or civil liability on members of Congress for their knowledge of the contents of the

bills considered by their committees threatens or impairs the legislative process. For example, as the House of Representatives operates today, according to the stricken testimony of Representative Frank, members specialize, devoting their time to only a limited amount of legislation.[15] Particularly with respect to noncontroversial issues, members depend on the expertise, competence, and good faith of colleagues when passing on bills with which they have little familiarity. This system, according to the judgment of the members, allows the House to work in the most efficient manner.

If legislators thought that their personal knowledge of such bills could one day be used against them, they would have an incentive (1) to avoid direct knowledge of a bill and perhaps even memorialize their lack of knowledge by avoiding committee meetings or votes, or (2) to cease specializing and attempt to become familiar with as many bills as possible, at the expense of expertise in any one area. Either way, the intimidation caused by the possibility of liability would impede the legislative process. Prohibiting inquiry into committee membership thus advances the Speech or Debate Clause's "fundamental purpose of freeing the legislator from executive and judicial oversight that realistically threatens to control his conduct as a legislator." Id. at 618, 92 S. Ct. at 2623.[16]

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[15]Our reference to Representative Frank's stricken testimony should not be taken as a comment on the propriety of the district court's ruling. We treat the representative's explanation of the workings of the House as we would a learned treatise: as an aid to our discussion coming from an authoritative source. We do not treat it as evidence.

[16]The threat of intimidation does not extend only to members of Congress who expect to become criminal defendants one day. A member could face the prospect of civil liability if a

[*1546] E. Swindall's Legislative Activities, Not Merely His Status, Were the Subject of the Government's Inquiry Moreover, it is inaccurate to call an inquiry into committee membership an inquiry into status rather than legislative activities. The government concedes that it could not introduce evidence of Swindall's speeches, votes, or legislative decisions to prove his knowledge of the money-laundering statutes. The district court ruled in its pretrial order that the government could not "question defendant about whether he attended committee hearings on these bills, whether he participated in debate on the bills, or whether he or his aides ever read the bills."[17] (Emphasis added.)

The district court, however, "permitted the government to argue that the jury may infer that defendant knew of the contents and requirements of these bills because he sat on the committees that considered them." This permissive inference[18] allowed the

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committee assignment could be used against him or her in court to prove knowledge of legislation. For instance, a member of Congress might sell a restaurant, representing that the property is in complete compliance with all applicable laws and regulations. If later it turns out that the property is not in compliance with the Americans with Disabilities Act (ADA), the purchaser, who is forced to make significant expenditures to make the property accessible to wheelchairs, could sue the member for fraud, claiming intentional misrepresentation and introducing evidence that the legislator was on a committee that considered the ADA.

[17]As noted above, the privilege extends to "those things generally said or done in the House or Senate in the performance of official duties." Brewster, 408 U.S. at 512, 92 S. Ct. at 2537.

[18]The entirely permissive inference or presumption ... allows -- but does not require -- the trier of fact to infer the elemental fact [the fact that is an element of the crime] from proof by the prosecutor of the basic one and which places no burden of any kind on the defendant. In that situation the basic fact may constitute prima facie evidence of the elemental fact. County

jury to infer that Swindall performed legislative acts to acquire knowledge about the bills. As Amicus Curiae Speaker and Bipartisan Leadership Group of the U.S. House of Representatives argues, "Knowledge of a committee member does not come from a vacuum; it comes from the committee's consideration of bills, reports, hearings, and debates." The government introduced evidence of Swindall's committee memberships to prove that he performed a legislative act to acquire knowledge of the contents of the bills, which is precisely what the clause prohibits. See Helstoski I, 442 U.S. at 494, 99 S. Ct. at 2442 (Stevens, J., dissenting) ("I agree that [Brewster and Johnson] ... prevent the prosecution from attempting to prove that a legislative act was performed.") (emphasis added).

The district court prohibited the government from offering proof that Swindall "ever read the bills," but it allowed the jury to assume that Swindall read the bills. That the inference refers to a legislative act that possibly never took place does not mitigate the Speech or Debate violation. In fact, it makes it worse: to rebut the inference, Swindall would be forced to answer for his entire approach to the legislative process to explain why he did not know of the contents of the bills. Allowing the inference, which virtually compels Swindall to justify his legislative actions, frustrates the purpose of the Speech or Debate privilege. As the Supreme Court stated in Powell v. McCormack, 395 U.S. 486, 505, 89 S. Ct. 1944, 1955, 23 L. Ed. 2d 491 (1969), "the ... protection [is] afforded legislators ... to insure that legislators are not distracted from or hindered in the performance of their legislative

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Court of Ulster County v. Allen, 442 U.S. 140, 157, 99 S. Ct. 2213, 2224, 60 L. Ed. 2d 777 (1979) (citations omitted).

tasks by being called into court to defend their actions."

F. The Proper Remedy for the Violations of the Privilege

Having determined that the Speech or Debate Clause covers a legislator's committee memberships, we also hold that the violations of the privilege that occurred before the grand jury require dismissal of the affected counts.[19]

1. Protection from Indictment

When a violation of the privilege occurs in the grand jury phase, a member's rights under the privilege must be vindicated in [*1547] the grand jury phase.[20] "'The instigation of criminal charges' is the 'predominant thrust' of the clause. In scrutinizing a criminal prosecution drawing into question legislative acts or the motivation for performing them, 'we look particularly to the prophylactic purposes of the clause.'" United States v. Helstoski (Helstoski II), 635 F.2d 200, 204 (3d Cir.1980) (quoting Johnson, 383 U.S. at 182, 86 S. Ct. at 756). It is not merely fear of conviction that can intimidate a legislator and threaten the legislative process; fear of indictment also can threaten the process. It was an indictment, not a conviction, that hung over Swindall's head when he lost his reelection bid in 1988.

We must recognize that the mere issuance of an indictment has a profound impact on the accused, whether he be in public life or not. Particularly for a member of Congress, however, publicity will be widespread and devastating. Should an election intervene before

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[19]We also note that the violations of the privilege at trial, if they stood alone, would require a new trial on the affected counts.

[20]Not every improper reference to Speech or Debate material before the grand jury is a violation of the privilege, however. See infra II.F.2.a.

a trial at which he is found innocent, the damage will have been done, and in all likelihood the seat lost. Even if the matter is resolved before an election, the stigma lingers and may well spell the end to a political career.

Far from being hyperbolic, this evaluation of an indictment's effect is coldly realistic. It cannot be doubted, therefore, that the mere threat of an indictment is enough to intimidate the average congressman and jeopardize his independence. Yet, it was to prevent just such overreaching that the speech or debate clause came into being. A hostile executive department may effectively neutralize a troublesome legislator, despite the absence of admissible evidence to convict, simply by ignoring or threatening to ignore the privilege in a presentation to a grand jury. Invocation of the constitutional protection at a later stage cannot undo the damage. If it is to serve its purpose, the shield must be raised at the beginning.

Observance of this rule will not foreclose indictments for illegal conduct beyond the scope of the speech or debate clause. All that is required is that in presenting material to the grand jury the prosecutor uphold the Constitution and refrain from introducing evidence of past legislative acts or the motivation for performing them. In that way the clause will meet its expectation of preserving the constitutional structure of separate, coequal, and independent branches of government. Helstoski II, 635 F.2d at 205-06 (citations omitted).

2. The Nature of the Speech or Debate Violations

During the grand jury phase, Swindall's Speech or Debate privilege was violated in two separate ways. First, his privilege against criminal liability was violated when reference to Speech or

Debate material was used as critical evidence leading to his indictment. Second, his privilege against being questioned in any place other than Congress was violated when he was questioned before the grand jury about Speech or Debate matters. Each violation, standing alone, requires dismissal of the affected counts.

The government argues that because the indictment was facially valid, it should not be dismissed. Generally, a court will not look behind the face of an indictment to invalidate it merely because the grand jury received incompetent evidence. See United States v. Calandra, 414 U.S. 338, 344, 94 S. Ct. 613, 618, 38 L. Ed. 2d 561 (1974); see also United States v. Carney, 665 F.2d 1064, 1065 (D.C.Cir.1981) (applying general rule to Speech or Debate claim), cert. denied, 454 U.S. 1081, 102 S. Ct. 636, 70 L. Ed. 2d 615 (1981). A court will consider the evidence received by the grand jury, however, when what transpired before the grand jury itself violates a constitutional privilege. See Calandra, 414 U.S. at 346, 94 S. Ct. at 619; Helstoski II, 635 F.2d at 203.

[*1548] a. Criminal Liability. – A member's Speech or Debate privilege is violated if the Speech or Debate material exposes the member to liability, but a member is not necessarily exposed to liability just because the grand jury considers improper Speech or Debate material. "A member of Congress may be prosecuted under a criminal statute provided that the Government's case does not rely on legislative acts or the motivation for legislative acts." Brewster, 408 U.S. at 512, 92 S. Ct. at 2537. If reference to a legislative act is irrelevant to the decision to indict, the improper reference has not subjected the member to criminal

liability.[21] The case can proceed to trial with the improper references expunged.

The government points out that in other cases involving improper inquiry into the legislative activities of criminal defendants, the Supreme Court has provided only the remedy of a new trial, not dismissal of the indictment. In Johnson, Speech or Debate material was improperly presented to the grand jury, and the Court ordered a new trial, reasoning that "the Government should not be precluded from a new trial on [a] count ... wholly purged of elements offensive to the Speech or Debate Clause." Johnson, 383 U.S. at 185, 86 S. Ct. at 758. The Court determined that the government's conspiracy case could be proved without evidence of a speech the member made on the floor of the House. We can extrapolate from this that evidence of the speech was not essential to the indictment and thus did not subject the member to liability at the grand jury stage. Similarly, in Brewster, the Supreme Court held that an indictment

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[21]For example, suppose a grand jury indicted a legislator for bank robbery after a prosecutor presented it with evidence of (1) a gun with the member's fingerprints, (2) a photograph of her robbing the bank, and (3) a copy of a speech she made on the floor of the House in favor of saving the Northern Spotted Owl. There would be no violation because the Speech or Debate material would not have exposed the legislator to liability.

We note that this is not a harmless error argument. The Speech or Debate privilege is not merely an evidentiary or a testimonial privilege. See Brewster, 408 U.S. at 512, 92 S. Ct. at 2537. As the Supreme Court has stated, "The Speech or Debate Clause was designed neither to assure fair trials nor to avoid coercion. Rather, its purpose was to preserve the constitutional structure of separate, coequal, and independent branches of government." Helstoski I, 442 U.S. at 491, 99 S. Ct. at 2441. Therefore, a harmless-error analysis will not excuse a violation. In the absence of liability, the grand jury's consideration of improper evidence is not a Speech or Debate violation at all.

referring to legislative acts could stand because "to make a prima facie case under this indictment, the Government need not show any act of [Brewster] subsequent to the corrupt promise for payment," and a conviction could be sustained without "inquiry into the [legislative] act or its motivation." Brewster, 408 U.S. at 526-27, 92 S. Ct. at 2544-45.[22]

In Helstoski II, however, the Third Circuit dismissed an indictment because improper Speech or Debate material was presented to the grand jury. According to the court:

Neither Brewster nor Johnson went behind the face of the indictment, and apparently, it was not contended in either case that the mere introduction of speech or debate material before the grand jury invalidated the indictment. It can be argued that implicit in the Court's holdings that the cases could be tried without reference to protected matters was the conclusion that the grand juries' considerations of the privileged material were not fatal to the indictments. Particularly in the circumstances of this case, however, where the infection cannot be excised, we are unwilling to adopt an interpretation limiting a right the Court has told us is so vital that it must be treated with sensitivity.

Helstoski II, 635 F.2d at 205 (emphasis added and citations omitted).[23] The court [*1549] determined that because the

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[22]Likewise, in United States v. Myers, 635 F.2d 932, 941 (2d Cir.), cert. denied, 449 U.S. 956, 101 S. Ct. 364, 66 L. Ed. 2d 221 (1980), an indictment was allowed to stand because it charged an illegal promise to perform a legislative act, and there was no reason to assume that at trial the government would have to introduce evidence of the actual performance of the act.

[23]The court added: "We do not know whether transcripts of the grand jury proceedings were available in Johnson and Brewster. Only in recent years has verbatim recording of grand jury

improper use of Speech or Debate material was so widespread, it was inseparable from the indictment. In other words, it exposed the member to criminal liability.

In the case at bar, the improper Speech or Debate evidence likewise was fatal to the indictment. This is not because the improper references were so widespread. Rather, it is because evidence of Swindall's legislative acts was an essential element of proof with respect to the affected counts. In the words of the government in its objections to magistrate's report and recommendation: it is critical to the prosecution of this case by the United States that this evidence be provided to the jury. The undercover operation of this investigation involved the Defendant's conversation about circumvention of bank forms and violation of federal currency laws. Unlike any other citizen in the United States, the Defendant would have a unique and specific knowledge in the understanding of the illegality of the circumvention of the currency transaction reports because of his former status as a member of the House Judiciary and Banking Committees. (Emphasis added.) The government itself argued that it could not have proved Swindall's knowledge of criminality without showing the grand jury that he was on the committees that considered the money-laundering statutes.

One must also bear in mind that this was a perjury indictment. The impressions formed by the grand jury that Swindall was lying were based in part on the AUSA's questioning of the Congressman about Speech or Debate matters. The grand jury observed Swindall respond to questions about his committee memberships, and then judged the truthfulness of his statements disclaiming knowledge or recollection of other matters. With respect to the affected counts,

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proceedings become common." Id.

no new indictment can issue from an excised transcript of Swindall's grand jury testimony because the decision to indict was inextricably linked to the grand jury's impressions of Swindall's answers to improper questions. As in Helstoski II, "the infection cannot be excised." 635 F.2d at 205.

b. Improper Questioning. – Moreover, even if the Speech or Debate material considered by the grand jury were separable from the decision to indict, the second distinct violation of Swindall's privilege requires dismissal of the affected counts. Alone among the defendants in the cases discussed, Swindall was also subjected to improper questioning before the grand jury.[24] We already have stated that when improper evidence is considered by a grand jury, a Speech or Debate violation occurs only if the evidence causes the jury to indict. When a member is improperly questioned, however, the violation occurs automatically. "It is the very act of questioning that triggers the protection of the Speech or Debate Clause." In re Grand Jury (Intervenor "A"), 587 F.2d 589, 598 (3d Cir.1978).

The only way to vindicate a member's privilege to be free from improper questioning is to exclude the fruits of such questioning. If the questioning occurs at trial, a conviction cannot stand. If the questioning occurs before the grand jury, the affected counts of the indictment cannot stand. Otherwise, there would be no deterrent to prosecutors from improperly haling a member of Congress before a grand jury to ask questions about protected legislative activities as long as they had sufficient other evidence to

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[24]In Johnson, the member was improperly questioned at trial.

indict.[25] The [*1550] AUSA's impermissible questioning of Swindall before the grand jury eliminates any doubts about the appropriateness of dismissal that might have lingered had the AUSA merely introduced evidence of Swindall's committee memberships.[26]

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[25]Arguably, a member could refuse to answer the questions on Speech or Debate grounds. The instant case, however, demonstrates why a member might not freely invoke the privilege when testifying before a grand jury. Obviously, Swindall would never have been indicted for perjury if he had invoked his Fifth Amendment right against self-incrimination. Political reality, however, precluded him from doing this. A leak from the grand jury that Swindall had taken the Fifth most likely would have badly damaged his political career. Likewise, using the Speech or Debate Clause to avoid answering questions about one's potentially criminal conduct could be politically damaging, and a legislator might be intimidated from invoking the privilege.

It is permissible for the government to put Swindall to a Hobson's choice concerning his Fifth Amendment right, which is his alone. It would violate the Constitution, however, to put Swindall to such a choice concerning his Speech or Debate privilege, which he in a sense holds in trust for the benefit of the people. We quote again the Helstoski I Court: "The Speech or Debate Clause was designed neither to assure fair trials nor to avoid coercion. Rather, its purpose was to preserve the constitutional structure of separate, coequal, and independent branches of government." Helstoski I, 442 U.S. at 491, 99 S. Ct. at 2441. The very act of putting a member to a choice between his freedom and his political career causes the intimidation detrimental to the legislative process that the clause prohibits. [**59]

[26]That a legislative act is memorialized in a public record does not, of course, sidestep the Speech or Debate issue. A member's legislative acts are protected whether or not they are published. See, e.g., Gravel, 408 U.S. at 615, 92 S. Ct. at 2622 (noting that member is protected from questioning "with respect to the events occurring at the subcommittee hearing at which the Pentagon Papers were introduced into the public record") (emphasis added). If the member himself or herself republishes a speech or a committee report, such republication is not a legislative act and

G. The Ex Parte Conference and the District Court's Evidentiary Rulings Related to the Speech or Debate Issue

Because we dismiss Counts One, Nine, and Ten on Speech or Debate grounds we need not consider the propriety of the district court's evidentiary rulings limiting Swindall's defense on the committee-membership issue to "evidence of the number of bills before these committees and then arguing that it is not reasonable to infer that a congressman is intimately aware of every bill before his committee." For the same reason, we need not reach the propriety of either striking the entire testimony of Representative Frank or holding an unannounced ex parte conference with the prosecutor. The ex parte conference did not affect the fairness of the rest of the trial and thus cannot be grounds for reversal of the remaining counts. See United States v. Walsh, 700 F.2d 846, 858 (2d Cir.1983), cert. denied, 464 U.S. 825, 104 S. Ct. 96, 78 L. Ed. 2d 102 (1983).[27]

II. Improper Reference to Swindall's Failure to Testify

Swindall next argues that his Fifth Amendment right against self-incrimination was violated when the prosecutor improperly

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is not protected. See Hutchinson v. Proxmire, 443 U.S. 111, 127-28, 99 S. Ct. 2675, 2684, 61 L. Ed. 2d 411 (1979).

Here, however, if Swindall had himself published in a circular that he was a member of the Banking and Judiciary Committees, he would retain his Speech and Debate privilege. He would lose the privilege only if he published a circular stating that because of his committee memberships he had knowledge of the money-laundering statutes.

[27]We note, however, that ex parte conferences "should occur but rarely, especially in criminal cases." United States v. Adams, 785 F.2d 917, 920 (11th Cir.1986).

referred to his failure to testify, and that the district court committed reversible error when it gave a curative instruction instead of ordering a mistrial. The government contends, and we agree, that the prosecutor's question, rather than being a comment on Swindall's failure to testify, was instead directed to defending the credibility of a government witness.

A. Procedural Background

Kirk Smith ("Smith") was a defendant in a related money-laundering trial who was convicted of conspiracy. He had testified that Swindall, while attempting to trade trial dates in order to go to trial before the November 1988 election, had boasted that he would not be convicted of perjury because, "Kirk, I'm a lawyer, and in front of the grand jury I used phrases like 'to the best of my recollection' and 'I don't recall,' and they can't convict me for having a bad memory."

A mini-trial on the truthfulness of Smith's testimony ensued. The government [*1551] called Dr. Edwin Hall ("Dr. Hall"), Smith's psychologist, who corroborated Smith's testimony, stating that Smith had repeated the comment to him contemporaneously. In its case in chief, the defense called Robert G. Fierer ("Fierer"), who had been Smith's lawyer at the time of the meeting with Swindall.[28] Smith had testified that after the meeting, Fierer had told him that they could possibly use Swindall's statement in the future by going to the government with it. Fierer testified that he never heard Swindall make such a statement, nor had he commented to Smith about it.

The defense also called Bobby Lee Cook ("Cook"), a criminal

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[28]Fierer is now representing Swindall in these appeals.

defense lawyer, to attack the credibility of Dr. Hall. The defense theory was that either (1) Smith lied about Swindall's testimony hoping for a sentence reduction or (2) Smith's ability to tell the truth was impaired by Dr. Hall's manipulations.

On cross-examination, the prosecutor asked Cook:

Would it also be a fair statement or assumption to make that, particularly in a criminal case, if a defendant were to testify and he knew that certain things that he testified about could help him win his case that he would be more prone to testify in that regard?

(Emphasis added.) Defense counsel immediately objected and, out of the presence of the jury, asked for a mistrial on the ground that the prosecutor had impermissibly commented on Swindall's failure to testify. Both defense counsel and the court apparently misheard the prosecutor's question because the district court agreed with defense counsel's assertion that the prosecutor had asked whether a defendant would choose to testify if he thought it would help his case.[29] As quoted above, the prosecutor actually asked about a defendant who already had decided to testify.[30]

The prosecutor stated that his question was part of an effort to

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[29]Defense Counsel: Your Honor, that is a direct comment upon Mr. Swindall's right not to take the stand in his own defense if he doesn't want to. He's asked this witness in the presence of the jury won't a defendant take the stand and testify if he thinks it would help him.

The Court: Yes, that was the question.

(Emphasis added.)

[30]Prosecutor: My question, your honor, did not involve whether or not they testified but if they do testify whether or not they're more prone to ... give answers under oath that they think will help them either financially or get them off the hook, but not whether or not they're willing to get up and testify or not testify. It has to do with when they're testifying.

defend Smith's credibility. According to the prosecutor, he first planned to ask Cook, as an experienced criminal defense attorney, about defendants' motivations when testifying about certain matters. Second, he planned to recall Fierer to the stand in the government's rebuttal case and adduce testimony that, preparing for Smith's trial, Fierer had told Smith that his best chance of winning was by testifying that he had withdrawn from the conspiracy, but that Smith had not given such testimony, later explaining to Fierer that he could not give untrue testimony.

B. Analysis

"The test for determining whether a prosecutor's remark constitutes an impermissible comment on a defendant's failure to testify is whether 'the statement was manifestly intended or was of such character that a jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.'" United States v. Carter, 760 F.2d 1568, 1578 (11th Cir.1985) (quoting United States v. Carrodeguas, 747 F.2d 1390, 1395 (11th Cir.1984) (quoting United States v. Wilson, 500 F.2d 715, 721 (5th Cir.1974), cert. denied, 420 U.S. 977, 95 S. Ct. 1403, 43 L. Ed. 2d 658 (1975)), cert. denied, 474 U.S. 816, 106 S. Ct. 60, 88 L. Ed. 2d 49 (1985)). The burden is on appellant to establish either one of these two criteria. Carter, 760 F.2d at 1578.

1. Manifest Intent of Statement

"In applying this test, the court cannot find that counsel 'manifestly intended' to [*1552] comment on the defendant's failure to testify if some other explanation for his remark is equally plausible." Id. at 1578 (quoting Carrodeguas, 747 F.2d at 1395) (quoting United States v. Rochan, 563 F.2d 1246, 1249 (5th Cir.1977)). We review the district court's determination of whether

"manifest intent" was present under an abuse of discretion standard. United States v. Watson, 866 F.2d 381, 386 (11th Cir.1989).

We agree with the district court that the prosecutor's explanation for his remark is, at the very least, as plausible as an interpretation that the prosecutor intended to comment on the defendant's failure to testify. Swindall argues that the explanation is not plausible because (1) Fed.R.Evid. 608 prohibits specific instances of a witness's conduct probative of character for truthfulness from being proved by extrinsic evidence, such as direct examination of another witness; (2) an attorney with the prosecutor's experience would therefore not lay the groundwork for evidence that could not be admitted; and (3) the only remaining explanation is that the prosecutor commented on Swindall's failure to testify.

We note first that appellant's Rule 608(b) argument fails because in fact the prosecutor did call Fierer to the stand on rebuttal and did question Fierer about the specific instance of Smith's conduct, and defense counsel did not object on Rule 608(b), or any other, grounds. We also note that Rule 608(b) provides that evidence of specific instances of a witness's conduct may, "in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of [a] witness ... concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified." Fierer already had testified for the defense that Smith had falsely testified about the meeting with Swindall. Arguably, the prosecutor could be allowed to recall Fierer on rebuttal and ask him, as if he were still cross-examining him, about specific instances of Smith's character for truthful-

ness. At the very least, the closeness of the question renders the prosecutor's explanation as plausible as any other.

2. How a Jury Would Understand the Statement

"The second part of the test requires a determination of whether the jury would naturally and necessarily take the statement to be a comment on [the defendant's] failure to testify. The question is not whether the jury possibly or even probably would view the remark in this manner, but whether the jury necessarily would have done so." Carter, 760 F.2d at 1578 (quoting Carrodeguas, 747 F.2d at 1395) (quoting Williams v. Wainwright, 673 F.2d 1182, 1185 (11th Cir.1982)). If the jury correctly heard the prosecutor's question, it would not have construed the question to be an impermissible comment about a defendant's decision to take the stand. Further, the trial court's curative instruction was adequate. See United States v. Capo, 693 F.2d 1330, 1335 (11th Cir.1982), cert. denied, 460 U.S. 1092, 103 S. Ct. 1793, 76 L. Ed. 2d 359 (1983).

III. Falsity and Materiality of Swindall's Statements and Ambiguity of the AUSA's Questions

Swindall next argues that, with respect to each count of the indictment, the government failed to prove the essential elements of perjury: that Swindall knowingly made false statements that were material to the grand jury investigation. Swindall also argues that, as a matter of law, some of his statements could not be false because the questions were fundamentally ambiguous.[31]

A. Falsity

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[31]We do not reach Swindall's claims regarding Counts One, Nine, and Ten because of our holdings dismissing these counts on Speech or Debate grounds. We reject as meritless Swindall's falsity, materiality, and ambiguity claims regarding other counts not explicitly discussed below.

We review a jury's determination of the falsity of statements made to a grand jury to determine "whether a reasonable jury [*1553] could so conclude beyond a reasonable doubt," viewing the evidence in the light most favorable to the government. United States v. Abrams, 568 F.2d 411, 417 n. 25 (5th Cir.), cert. denied, 437 U.S. 903, 98 S. Ct. 3089, 57 L. Ed. 2d 1133 (1978).[32]

Swindall argues that the statement for which he was convicted in Count Seven – that the $ 150,000 check he received from LeChasney on September 25, 1987, had "nothing to do with" the proposed $ 850,000 deal with Agent Mullaney was literally true because "there was a clear distinction between the $ 150,000 LeChasney check and the Mullaney cash." Swindall admitted, however, that he signed a document stating that "I ... have this day received the sum of One Hundred and Fifty Thousand Dollars ($ 150,000.00) as an advance upon a real estate loan upon my residence ... the total amount of the loan to be Eight Hundred and Fifty Thousand Dollars ($ 850,000.00)." (Emphasis added.) Swindall attempted to explain that, despite his signing of this document, the $ 150,000 check from LeChasney was an entirely separate loan agreement. Evidence further connecting the check to the larger deal, however, included that (1) Swindall discussed the check with Agent Mullaney as one of a series of $ 150,000 payments, and (2) after the larger deal fell through, Swindall returned the check and LeChasney stopped payment on the check. We hold that there was sufficient evidence for a reasonable jury to find that Swindall's statement was false.

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[32]Decisions of the former Fifth Circuit issued before October 1, 1981, are binding precedent in the Eleventh Circuit. See Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc).

B. Fundamental Ambiguity

Swindall contends that, as a matter of law, he cannot be convicted for making the false statements charged in Count Two because the AUSA's questions were fundamentally ambiguous.[33] We note first that "the burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry." Bronston v. United States, 409 U.S. 352, 360, 93 S. Ct. 595, 601, 34 L. Ed. 2d 568 (1973).

"When a line of questioning is so vague as to be 'fundamentally ambiguous,' the answers associated with the questions posed may be insufficient as a matter of law to support [a] perjury conviction." United States v. Manapat, 928 F.2d 1097, 1099 (11th Cir.1991) (quoting United States v. Lighte, 782 F.2d 367, 375 (2d Cir.1986)). Review is de novo. See Manapat, 928 F.2d at 1099.

When, however, a question is only arguably ambiguous and "'an answer would be true on one construction of [the] question but false on another' ... the defendant's understanding of the question is a matter for the jury to decide." United States v. Bell, 623 F.2d 1132, 1136 (5th Cir.1980)[34] (quoting United States v. Slawik, 548 F.2d 75, 86 (3d Cir.1977)). In such a situation, we review under the same sufficiency-of-the-evidence standard used for a jury's determination of falsity. See Bell, 623 F.2d at 1136. Further, "the fact that some ambiguous questions were asked does not preclude a perjury conviction. 'If the response given was false as the defendant understood the question, his conviction is not

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[33]The government erroneously asserts in its brief that Swindall failed to challenge on appeal the falsity of the statements contained in this count.

[34]See supra note 32.

invalidated by the fact that his answer to the question might generate a number of different interpretations.'" Lighte, 782 F.2d at 375 (2d Cir.1986) (quoting United States v. Williams, 552 F.2d 226, 229 (8th Cir.1977)).

Swindall stresses particularly that the question contained in the following colloquy was ambiguous:

Q: Do you have a specific recollection about engaging in a conversation wherein it was discussed a money trail or the ramifications of the money trail from Mike's [Agent Mullaney's] sources to ultimately you and what potential liability would exist or you would be exposed to?

[*1554] A: No. Only in the sense that I said, would you do the deal, would you do it, if you were in my shoes? That's my recollection. (Allegedly false declaration underlined.)

"A question or phrase is ambiguous as a matter of law when it 'is not a phrase with a meaning about which men of ordinary intelligence could agree, nor one which could be used with mutual understanding by a questioner and answerer unless it were defined at the time it were sought and offered as testimony.'" Manapat, 928 F.2d at 1100 (quoting United States v. Lattimore, 127 F. Supp. 405, 410 (D.D.C.), aff'd, 232 F.2d 334 (D.C.Cir.1955)). To demonstrate the degree of ambiguity here, defense counsel on cross-examination asked Agent Mullaney the exact same question set out above. The agent stated that he was "not sure" whether he understood it.

Although this question standing alone indeed appears to be ambiguous, we are unconvinced that it was so ambiguous as to have removed from the jury the issue of the falsity of Swindall's answer. First, parsing this question into its essential elements, we see that the AUSA asked whether Swindall engaged in a conversation in

which it was discussed what his "potential liability" would be if a "money trail" connected him with the undercover agent's investors. That Swindall correctly understood this to be a question about whether he discussed the liability to which he was exposing himself by taking the cash was evidenced by his answer: "No. Only in the sense that I said, would you do the deal, would you do it, if you were in my shoes?"

Second, a review of the question in the context of the line of questioning that preceded it indicates that it was, in fact, rather precise. The AUSA first asked a series of questions about whether Swindall had first discussed the illegality of the deal and then discussed using LeChasney as a buffer to shield him from liability. The AUSA asked Swindall five times[35] if Swindall had dis-

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[35]Were you advised about the illegality of the operation, and yet you continued to discuss the fact that Charles would be used as a buffer for you?

* * * * * *

Did you state that Charles would be used as a buffer for you in this negotiation?

* * * * * *

And I'd like you to give me an answer yes or no, or whatever you think your answer should be as to whether or not following the statement that your conduct might be illegal whether you continued to discuss the fact that Charles would be your buffer in the transaction, therefore, blocking you from any sort of exposure?

* * * * * *

Following that conversation that you've told us about, did you continue to negotiate the deal and continue to put forward the proposition that LeChasney would be used as your buffer in this transaction?

* * * * * *

And what I'm saying is, following that conversation, did you continue to negotiate how the deal would be transpired by using Charles LeChasney as your buffer in this transaction?

cussed using LeChasney as a buffer, and each time Swindall evaded answering the question. Finally, the AUSA divided the question into two parts: first, did Swindall discuss his potential liability, and second, did he discuss using LeChasney as a buffer. In this context, it is our view that a person of ordinary intelligence would understand the question.

Swindall answered that he did not recall any specific discussion about protecting himself from liability. The government played for the jury, however, a tape in which Swindall stated that "there's no question in this transaction that I am basically using Charles as my buffer," and "where Charles gets his money is his business, his problem." We find that the question was at most "arguably ambiguous" and that there was ample evidence for the jury to determine either that Swindall understood the question, or that his answer was false with respect to any reasonable construction of the question.

C. Materiality

Swindall argues that the government failed to prove that the false statements charged in Count Three were material. "A statement is material if it is capable of influencing the grand jury's investigation. To the extent that truthful answers [*1555] might assist the grand jury's investigation, false statements are material notwithstanding an abundance of evidence facilitating access to the truth." United States v. Corbin, 734 F.2d 643, 654 (11th Cir.1984) (citations omitted). Further, "the statement need not be material to any particular issue but may be material to any to any proper matter of inquiry." Abrams, 568 F.2d at 420. Materiality is a legal question subject to de novo review. United States v. Molinares, 700 F.2d 647, 653 (11th Cir.1983).

Count Three charged Swindall with falsely stating that he "walked away from [the deal], basically," after the Greenbriar meeting. Swindall argues that this statement is not material because he admitted later in his testimony that "after Greenbriar I was back in it." We agree with the district court that this statement is material because, if believed, it would have steered the grand jury away from inquiry into later money-laundering discussions. Swindall's subsequent testimony that the negotiations continued did not diminish the materiality of the earlier false statement and did not qualify as a recantation. See 18 U.S.C. § 1623(d); United States v. Scrimgeour, 636 F.2d 1019, 1024 (5th Cir.), cert. denied, 454 U.S. 878, 102 S. Ct. 359, 70 L. Ed. 2d 188 (1981).[36]

IV. Newly Discovered Evidence and Governmental Misconduct I

Case No. 91-8329 is an appeal from the district court's denial of Swindall's first post-trial motion for either a new trial on the basis of newly discovered evidence or dismissal of the indictment on the ground of governmental misconduct. After a thorough review of the record, we agree with the district court that Swindall's claim of prosecutorial misconduct is without merit. We reject this claim without discussion and turn to the district court's denial of Swindall's motion for a new trial based on newly discovered evidence. We review under an abuse-of-discretion standard. See United States v. Russo, 717 F.2d 545, 550 (11th Cir.1983).[37]

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[36]See supra note 32.

[37]Because of our Speech or Debate Clause holdings, we do not reach Swindall's claims with respect to Counts One, Nine, and Ten. We reject all other claims that we do not specifically discuss.

Swindall contends that the government withheld the contents of three surveillance tapes[38] in which Swindall was mentioned by LeChasney, Agent Mullaney, and Amado Hernandez ("Hernandez"), a confidential informant who assisted Agent Mullaney in the money-laundering investigation.[39]

Whether a defendant is entitled to a new trial based on newly discovered evidence that was suppressed by the government is controlled by Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215 (1963): "The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

"The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383, 87 L. Ed. 2d 481 (1985). "Impeachment evidence ... falls within the Brady rule," id. at 676, 105 S. Ct. at 3380, when the "reliability of a given witness may well be determinative of guilt or innocence." Napue v. Illinois, 360 U.S. 264, 269, 79 S. Ct. 1173, 1177, 3 L. Ed. 2d 1217 (1959). [*1556]

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[38]The district court found that hundreds of tapes were made during the multi-city money-laundering investigation.

[39]By failing to brief or argue them on appeal, Swindall waives his claims that the government also improperly withheld a statement by a witness regarding the $ 150,000 check from LeChasney's Dean Witter account and information about the contents of bank and brokerage accounts controlled by LeChasney.

To state a claim under Brady, a defendant must show: (1) that the government possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. United States v. Meros, 866 F.2d 1304, 1308 (11th Cir.), cert. denied, 493 U.S. 932, 110 S. Ct. 322, 107 L. Ed. 2d 312 (1989) (citations omitted). Because we agree with the district court that Swindall has not satisfied the fourth prong, we will limit our discussion to why Swindall cannot show a reasonable probability that the outcome of the proceeding would have been different if the newly discovered evidence had been disclosed to the defense.

Swindall's allegations include that the tapes reveal (1) a plot between LeChasney, Agent Mullaney, and Hernandez to "set up" Swindall to put him in a compromised position, and (2) that Agent Mullaney gave false testimony about the connection between LeChasney's $ 150,000 check and the larger deal.

It must be remembered that Swindall was convicted of perjury, not money-laundering. Tapes relating to an alleged entrapment plot would not be relevant to whether Swindall knowingly made false statements to the grand jury. As the government notes, there is no "perjury trap" defense available to Swindall here. See United States v. Chen, 933 F.2d 793, 797 (9th Cir.1991). This evidence is therefore relevant only to impeaching the credibility of witnesses LeChasney and Agent Mullaney.

Unfortunately for Swindall, the star witness against him was

himself. In Counts Two, Three, Five, Six, and Eight, Swindall was convicted for falsely testifying about conversations in which he had participated or about actions that he had personally taken. With respect to most of these counts, Swindall's grand jury statements were contradicted by Swindall's earlier tape recorded statements. Attacking the credibility of other witnesses could not undermine confidence in these convictions.

Impeaching the credibility of LeChasney and Agent Mullaney is relevant only to Count Seven, in which the government charged that Swindall falsely stated that the $ 150,000 check from LeChasney "had nothing to do with" the proposed $ 850,000 deal with the agent. In fact, even in Count Eight, Swindall's own tape recorded statements tied the $ 150,000 check so closely to the larger deal that it is difficult to imagine how impeaching LeChasney and Agent Mullaney could undermine confidence in the conviction.

In a tape recorded September 25 conversation, after Swindall received the $ 150,000 from LeChasney but before he returned it, Swindall and Agent Mullaney engaged in the following colloquy:

Swindall: All right. Let me see if I understand this before we get together. Here is my objective: I have signed an assignment and given Charles the original note.

Agent: Right.

Swindall: Each time Charles gives me his check for a hundred and fifty, I will sign another note --

Agent: Right.

Swindall: -- that updates it to the eight-fifty. There will never be – As far as I'm concerned, I will always be taking Charles' money.

(Emphasis added.) Further, as noted above, (1) Swindall signed a

document acknowledging that the check was an advance on the larger loan, and (2) Swindall's actions in returning LeChasney's check after rejecting the deal with Agent Mullaney strongly indicate that Swindall testified falsely about one having "nothing to do with" the other.

Further, we note that LeChasney was so thoroughly discredited during the original trial that the prosecutor in his closing statement was forced to tell the jury: I want to talk about Charles LeChasney, and I want to give Mr. LeChasney a [*1557] grade. Let's give Mr. LeChasney a score. I would like to suggest a score for Mr. LeChasney, if you don't mind me giving you a suggestion: Zero. Zero. Give Charles LeChasney a zero, except where Charles LeChasney's testimony is corroborated either by statements made by Patrick Swindall or by his brother or by other witnesses. Give him a zero.

It is hard to imagine how further diminution of LeChasney's credibility is possible, let alone likely to have affected the outcome of the trial.

We note also that the statements of Agent Mullaney recorded on the tapes were made in the agent's undercover role as a representative of Colombian drug dealers. The district court found that Agent Mullaney made the statements in keeping with his assigned pose. We agree with the district court that such statements do not diminish the credibility – or even contradict – the statements that Agent Mullaney made under oath in the trial. We therefore need not delve deeply into appellant's assertions about how the statements on the tapes should be interpreted.[40]

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[40]Swindall's allegations include reference to an October

Accordingly, we affirm the district court's denial of Swindall's first post-trial motion.

V. Newly Discovered Evidence and Governmental Misconduct II

Case No. 91-9017 is an appeal from the district court's denial of Swindall's second post-trial motion for either a new trial on the basis of newly discovered evidence or dismissal of the indictment on the ground of governmental misconduct. The allegedly newly discovered evidence consisted of more tapes of LeChasney and Agent Mullaney and a canceled check produced by Swindall. Once again, we reject Swindall's claim of prosecutorial misconduct without discussion. With respect to Swindall's Brady claims, we agree with the district court that the majority of the allegedly newly discovered evidence is either cumulative of evidence raised in Swindall's first post-trial motion or is cumulative of evidence actually introduced in the original trial. We thus affirm the district court's denial of Swindall's second post-trial motion.

2, 1987, surveillance tape in which Agent Mullaney and Swindall were discussing the promissory note that Swindall signed in exchange for the $ 150,000 check. According to the district court, Mullaney "laughingly" concluded, "This is a straight deal. This isn't the way it would have been if it was me." Swindall contends that this is proof that Agent Mullaney perjured himself when he stated that the $ 150,000 check was related to the $ 850,000 deal. We agree, however, with the district court that the government's explanation of the statement is more convincing: The evidence at trial showed that the deal under consideration by the defendant would be on two levels: one level was to assure Mike's investors that the defendant got the cash and signed a handwritten receipt in Mike's presence; the other level was to show a "straight deal" for defendant's protection. Therefore, Agent Mullaney in his undercover capacity was merely stating that LeChasney had achieved only Swindall's objective – to make the deal look like a "straight deal" – but had not achieved the agent's objective – to obtain a handwritten receipt acknowledging the actual deal.

CONCLUSION

For the foregoing reasons, we REVERSE Swindall's convictions on Counts One, Nine, and Ten, and REMAND to the district court with instructions to VACATE the convictions and to DISMISS these counts with prejudice because of violations of the Speech or Debate Clause that occurred before the grand jury.

We AFFIRM appellant's convictions on the remaining counts.

APPENDIX II

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 89-8746, 91-8329 & 91-9017

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

PATRICK L. SWINDALL,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

Before: KRAVITCH, Circuit Judge, GOBOLD AND JOHNSON*, Senior Circuit Judges.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions(s) of Rehearing en Banc ARE DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a

majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch
UNITED STATES CIRCUIT JUDGE

*See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

[FILED U.S. Court of Appeals Eleventh Circuit, November 30, 1992, Miguel J. Cortez, Clerk]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 89-8746, 91-8329 & 91-9017

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

PATRICK L. SWINDALL,

Defendant-Appellant.

Appeals from the United States District Court
for the Northern District of Georgia

Before KRAVITCH, Circuit Judge, GOBOLD AND JOHNSON*, Senior Circuit Judges.

O R D E R:

The order entered on November 30, 1992 on petition for rehearing and suggestion of rehearing en banc is hereby rescinded, the mandate not having issued.

The appellee is hereby instructed to respond to the Petition For Rehearing And Suggestion For Rehearing En Banc within fourteen days from receipt of this order.

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch
UNITED STATES CIRCUIT JUDGE

*See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

[FILED U.S. Court of Appeals Eleventh Circuit, December 3, 1992, Miguel J. Cortez, Clerk]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 89-8746, 91-8329 & 91-9017

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

PATRICK L. SWINDALL,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

Before: KRAVITCH, Circuit Judge, GOBOLD AND JOHNSON*, Senior Circuit Judges.

PER CURIAM:

( ) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions(s) of Rehearing en Banc ARE DENIED.

(X) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appel-

late Procedure; Eleventh Circuit Rule 35-5), the Suggestions(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch
UNITED STATES CIRCUIT JUDGE

*See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

[FILED U.S. Court of Appeals Eleventh Circuit, June 9, 1993, Miguel J. Cortez, Clerk]

APPENDIX III

EXCERPTS OF RECORD

[R. 5-73, 74] GOVERNMENT'S OBJECTIONS TO MAGISTRATE'S REPORT

[73] In the body of the Report and Recommendation, the Magistrate recommends that the Defendant's Motion to Quash the Indictment be denied, but the Government be prevented [from] introducing evidence or argument mentioning the Defendant's activities as a member of the Banking Committee.

The United States agrees with that finding. Pursuant to that finding the United States could introduce evidence that the Defendant was a member of the Judiciary and the Banking Committee and that money laundering statutes, specifically the 1986 amendments, were matters addressed by those committees. The United States has no intention of introducing any statement, vote, or other legislative act of the Defendant during his membership on the Judiciary or Banking Committees.

However, in the Magistrate's summary on Page 32, it is stated that it is recommended that the Defendant's motion to quash the indictment be denied with a prohibition as to the mention of the Defendant's membership in the Banking Committee. In light of the Magistrate's findings in the body of the Report and Recommendation, it is apparent that his reference to prohibition as to the Defendant's status as a member in the Banking committee was in error. The United States moves this Court to clarify that aspect of the Report and Recommendation and [74] asks that the summary be consistent with the body of the Report and Recommendation which would allow introduction of the Defendant's membership in the Judicial and Banking Committees, and evidence concerning legislation that

was relevant to those committees. In the event that the Magistrate intended to restrict the mention of the Defendant's membership in the Banking and Judiciary Committees, the United States would object to such a finding. Such a finding would be inconsistent with the Supreme Court opinions cited by the United States and by the Magistrate in the Report and Recommendation.

It is critical to the prosecution of the case by the United States that this evidence be provided to the jury. The undercover operation of this investigation involved the Defendant's conversation about circumvention of bank forms and violation of federal currency laws. Unlike any other citizen in the United States, the Defendant would have a unique and specific knowledge in the understanding of the illegality of the circumvention of the currency transaction reports because of his former status as a member of the House Judiciary and Banking Committees. Such a prohibition regarding his status as a member of these committees would be tantamount to a prohibition from the United States mentioning to the jury that the Defendant was ever in Congress at anytime.

[R. 7-140] AFFIDAVIT OF REP. FRANK

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA
vs.
PATRICK SWINDALL

Docket No. CR88-477A
Atlanta, Georgia

AFFIDAVIT OF BARNEY FRANK

Washington, District of Columbia

BARNEY FRANK, being duly sworn, deposes and says:

1.

My name is BARNEY FRANK. I am a resident of the State of Massachusetts. I am a Member of the U.S. House of Representatives representing the 4th district continuously since January of 1981. I have personal knowledge of the matters stated in this Affidavit.

2.

During the 99th Congress (1985-1986), I served on both the House Judiciary Committee and the House Banking, Finance and Urban Affairs Committee.

3.

On June 12, I appeared as a witness for the defendant, PATRICK L. SWINDALL, in the above styled case.

4.

I testified as an expert on the legislative history of H.R. 5484, the Antidrug Abuse Act of 1986 in general and the "Structuring Transactions" provision contained in section 1354 of said bill in particular.

5.

Had I been asked at the trial to respond to the question, "Well, you had indicated that you're aware of the legislative history of this (H.R. 5484). You are also aware that Mr. Swindall co-authored the money laundering bill with Mr. McCollum (H.R. 1367)?" I would have testified that I knew for a fact that Mr. Swindall did not co-author H.R. 5484, the bill about which I had testified and that I had no personal knowledge regarding H.R. 1367 except that it was a very different bill from H.R. 5484 and that H.R. 1367 died in the Crime Subcommittee of the House Judiciary Committee.

6.

I would have further testified that Mr. Swindall did not co-author or co-sponsor H.R. 5176, the bill considered by the Committee on Banking, Finance and Urban Affairs from which the "Structuring Transactions" provision (section 1354) of H.R. 5484 derived. I would have further testified that H.R. 5176 was never considered by the House Judiciary Committee.

/s/ Barney Frank
BARNEY FRANK

[R. 25-52, 53] MULLANEY'S TRIAL TESTIMONY

[52] Q. As of September the 25th, were you and Mr. Swindall sufficiently agreeable on the details of the transaction for Mr. LeChasney to give Mr. Swindall your money?

A. As of what date?

Q. September the 25th.

A. Well, as I say, I was going to have to meet with Mr. Swin-

dall, so if you are asking me if there was enough to give it to Mr. LeChasney to give it to him, no.

Q. So as of September the 25th, you were not sufficiently agreeable on the details to go forward with the $150,000 transaction?

[53] A. Not without Mr. Swindall, no sir.

[R. 27-208, 209] LECHASNEY'S TRIAL TESTIMONY

[208] Q. In fact, you even told Mike that you had scraped together $150,000.00 of your own money in order to go ahead and satisfy Pat's needs?

A. I did not say that I scraped the money together. I said that I got some money and was going to give it to Pat.

Q. Do you remember Mike asking you, "So you went–you scraped the $150,000.00 of your own money together"?

A. He might have said that, yes.

Q. And you told him it was your money, correct?

A. That's correct.

* * * *

[209] Q. You told the grand jury when you came back in that Mr. Swindall could have perceived that he was borrowing the money from you?

A. That's correct.

[R. 29-108] GRAND JURY FOREPERSON'S TRIAL TESTIMONY

Q. At the time – you indicated that by Mr. Swindall stating

that he never satisfied himself with respect to criminality, would that statement, if you had believed that, would that have made Mr. Swindall more credible or less credible with the grand jury?

A. Yes, it would have added to his credibility, but could I continue?

Q. Yes, sir.

A. But, you know, the later testimony and the other evidence that was presented, we had to look at the whole thing in the grand jury. And when you look at the entire package, it was obvious about the criminality of it and all to us.

[R. 33-93, 96, 97] REP. FRANK'S TRIAL TESTIMONY

[93] Q. Now, in 1986 were you on other committees in addition to the Judiciary Committee?

A. I was. I was then and still am on the Government Operations Committee, on the Select Committee on Aging, which does not legislate but just kind of pokes around, and the Committee on Banking, Finance and Urban Affairs, which deals with housing issues and regulation of the banking system.

Q. For convenience I'm just going to refer to that last committee as the Banking Committee, okay?

A. (Nods head affirmatively.)

Q. In 1986 was Pat Swindall on the banking committee?

A. No. Not as I remember it.

Q. Did he at some subsequent time become a member of the Banking Committee?

A. My recollection is, which I refreshed, that he joined the

committee in 1987 when a vacancy was created by the death of one of the republican members.

* * * *

[96] Q. It was considered by the Banking Committee. Correct?

A. This provision came from the Banking Committee.

* * * *

[97] * * * [T]he Judiciary and Banking Committees both dealt with the issue of concealing funds from the standpoint of drugs, but the particular provision that you showed me on structuring was, as I have reread the documents, only in the Banking committee's version. It was not in the Judiciary Committee's version in the House.

Q. All right. And Pat Swindall was not on the Banking Committee at that time. Correct?

A. No, he was not. Not in 1986. Not when this Bill passed.

[R. 33-116, 118, 122-23] TRIAL JUDGE'S STRIKING OF REP. FRANK'S TESTIMONY

[116] The government said they had a document that indicated that Mr. Swindall co-authored in the Judiciary Committee the money laundering bill. That's what they told me in camera, the government. And I don't know what you know about it.

But, in any event, if we get into that, it's gone. So I'm not going to let you do it. I'm not going to let you cross-examine Congressman Frank. I'm going to strike his testimony.

These documents that you have had him identify that you tell me relate to the number of bills that went before the committee and things of this nature during the years in question, you can intro-

duce those without even having them authenticated by Congressman Frank. I assume they're self-authenticating.

Are they?

MR. THRASH: Yes, sir.

THE COURT: Well, you don't need Congressman Frank for that. So that's the way it's going to be. There's not going to be any argument about it. That's it.

MR. THRASH: Your Honor, did you say you didn't want to hear any argument about it?

THE COURT: No, sir, I don't want to hear any argument about it.

* * * *

[118] MR. THRASH: I just want to have it on the record our strong objection to the Court striking Congressman Frank's testimony.

THE COURT: Yes, sir, I know it.

MR. THRASH: Our strenuous objection to that.

* * * *

[122] MR. THRASH: Your Honor, I think if we'd been there [123] we could've stated to the Court our position that the bill which Mr. Gillen is referring to is entirely -- is a different bill from any bill mentioned by Congressman Frank during his testimony.

[R. 37-143] PROSECUTOR'S CLOSING ARGUMENT

And he also, I'm reminded by Mr. Swindall, was on the Banking and Judiciary Committee, the very committees that had jurisdiction over these two laws. There are about 240 million Americans. 435

of them are in Congress. And the documents will go out with you. Do you know how many of them on the Republican side are on both the Judiciary and the Banking Committees at that time in the One-Hundredth Congress? Two; two.

And yet he would have you believe he was not aware of the law. Who then will we hold accountable to the law?

Who then stands before the law, if not a man that's a lawyer, a congressman on those committees, and only two Republican congressm[e]n on both of those committees. But yet he did not know.

[Gov. Ex. 44T] PETITIONER'S GRAND JURY TESTIMONY

[3] Q. During that telephone conversation, I orally advised you, as I have orally advised your counsel, Mr. Richard Hendrix and Mr. Larry Thompson, of the following: one, that you are not a target of the grand jury investigation, but that, two you are a subject of the grand jury investigation. I explained to you during the telephone conversation, and I did not have to explain to Mr. Hendrix and Mr. Thompson because of their experience in the area, the legal meaning of that term as it applies in the United States Attorney's Manual. And on the record I will again state that because the scope of your conduct is within the scope of the grand jury investigation then you are deemed, pursuant to the U.S. Attorney's Manual as a subject and, as such, it is my obligation and was my obligation to attach an advice of rights form to your grand jury subpoena which I did, and which stated as follows. The grand jury is conducting an investigation of possible violations of federal

criminal laws involving the illegal laundering of currency in violation of Title 31, United States Code Sections 53.13 and 53.24. You may refuse to answer any questions, if a truthful answer to the question would tend to incriminate you. If you have retained counsel, the grand jury will permit you a reasonable opportunity to step outside the grand jury room to consult with counsel, if you so desire.

* * * *

[46] Q. And you were aware of the Title 31 requirements as to banking?

A. I was not at the time specifically aware of the forms, but I was aware in the general sense that when you make a deposit of cash in a large sum there is a disclosure requirement.

* * * *

[52] Q. Mr. Swindall, particularly being a member of the Banking Committee, I'm sure you're aware of the recent amendments to Title 31 which have to do with the structuring violations in terms of – it was an amendment to 53.13, specifically, and 53.24, which deal with the specific issue of people structuring financial transactions underneath ten thousand dollars so they can -- they avoid those sorts of things.

A. I am now aware of that. At the time, I was – in fact the first awareness I had of that specific code section was when I received your subpoena.

* * * *

[108] Q. Now, this eight hundred and fifty thousand dollars, the ultimate source of that was to have been monies [109] from Mike's investors; isn't that correct?

A. That was my understanding; if we agreed on all the de-

tails, that would be the source of it.

Q. Were you sufficiently agreeable on the details so that you went forward and received a hundred and fifty thousand dollar check from Mr. LeChesney on September 25, 1987?

A. No, sir. That had nothing to do with that.

Q. The note says, I have this day received the sum of one hundred fifty thousand dollars as an advance upon a real estate loan upon my residence located at -- and it gives the address. The total amount of the loan to be eight hundred fifty thousand dollars. Now, that's the eight hundred and fifty thousand dollars that we're talking about in the context of Mike and his investors; isn't it?

A. That is the eight hundred and fifty thousand dollars that, if I reached an agreement with Charles, Mike, and these other fellow, that would be delivered, and Charles would be reimbursed the hundred and fifty thousand dollars that he advanced. And the way that came about was I told Charles that I had to do something very soon because I had a hundred and fifty thousand dollars that was roughly what I could project I had to spend fairly soon. And I told him that I needed one hundred and fifty thousand dollars fairly quickly, as we talked about this other transaction. And he [110] says, I can get a hundred and fifty thousand dollars until we work out the agreement. And, if we work out the agreement, then I will get the hundred and -- the eight hundred and fifty thousand, and I will reimburse myself for the hundred and fifty thousand, that is, Charles would personally advance me a hundred and fifty thousand dollars. I told him, Charles, I am not comfortable with finalizing anything. And, at that point, we realized that, if we ever did finalize anything, that I would not be in Atlanta for some

time, and that I would go to his attorneys, sign that note, take a cashiers' check, or his attorney's account, and then over the weekend, if we could not finalize this, I would basically give him back the money, the transaction would be void. If we did finalize it, I would keep the hundred and fifty thousand dollars, and then when he had the eight hundred and fifty thousand dollars he would reimburse himself one hundred and fifty, and the rest would go, at the closing, to me.

Q. Did you indicate to Mike that, as the deal began to wear down, that you wanted Mike to just go ahead and reimburse him the hundred and fifty thousand dollars on your note?

A. If we met and agreed and there was a consummation of it, yes, I told him that Charles had advanced me a hundred and fifty thousand dollars which he would be authorized to reimburse to Charles.

[R. 25-41] MULLANEY'S TRIAL TESTIMONY

Q. Did you ever tell Mr. Swindall that you violated the laws of the United States?

A. No, sir. I told him that I violated currency laws.

Q. You never told him that you violated the laws of the United States, did you?

A. I did not use that term, "I violate the laws of the United States," no.

APPENDIX IV

UNITED STATES CONSTITUTION

ARTICLE I, § 6

The Senators and Representatives shall receive a Compensation for their services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

AMENDMENT V

No person shall be held to answer for capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor

shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Supreme Court, U.S.
FILED
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No. 93-389

In the Supreme Court of the United States

OCTOBER TERM, 1993

PATRICK L. SWINDALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

MERVYN HAMBURG
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the introduction before the grand jury and at trial of evidence that violated the Speech or Debate Clause required dismissal of all the counts of the indictment, including those counts that were unrelated to petitioner's acts as a member of the House of Representatives.

2. Whether, in striking the testimony of a defense witness after an ex parte conference with the prosecutor, the district court deprived petitioner of a fair trial on six perjury counts that were unrelated to the subject of the witness's testimony.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A56) is reported at 971 F.2d 1531.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 1992. A petition for rehearing was denied on June 9, 1993. Pet. App. A61-A62. The petition for a writ of certiorari was filed on September 7, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted on nine counts of making false material declarations to the grand jury, in violation of 18 U.S.C. 1623. He was sentenced to 12 months' imprisonment and fined $30,000. The court of appeals affirmed petitioner's convictions on six counts, but reversed the remaining convictions. Pet. App. A1-A56.

1. In 1987, as part of a nationwide money-laundering investigation by the Internal Revenue Service, Agent Michael Mullaney posed as a Miami-based representative of Colombian drug dealers charged with converting large amounts of cash generated by drug proceeds into other assets. During the investigation, Mullaney frequently used Charles LeChasney to launder money. Petitioner, then a member of Congress, knew LeChasney from Republican Party fundraising events. In mid-1987, petitioner sought LeChasney's help in obtaining funds to cover cost overruns incurred in the construction of a new home. Petitioner told LeChasney that he had received a $1,000,000 note from the sale of commercial property, that he was willing to sell the note or use it to obtain a loan, and that he wanted to avoid adverse tax consequences. LeChasney responded that he knew of investors who might be willing to buy the note, but that the proceeds would be in cash. LeChasney explained that the investors had fled to the United States from Central or South America and wished to hide their assets and identities. See Pet. App. A3-A4.

On July 9, 1987, LeChasney told Mullaney about petitioner's need for funds and his $1,000,000 note. At an August 28 meeting, petitioner told Mullaney and LeChasney that because of changes in the tax laws, he preferred obtaining a loan rather than selling the note. Mullaney replied that he represented South American investors who wished to dispose of cash while concealing their assets and identities; accordingly, any deal would be in cash. Petitioner suggested that LeChasney form a mortgage company secretly funded by Mullaney's principals. The company could give petitioner $850,000 for his note, creating the impression that LeChasney's mortgage company had made a routine loan to petitioner. Petitioner also asked why he could not simply deposit all the proceeds in a bank. Mullaney explained that currency transaction report forms would have to be filled out, requiring petitioner to reveal the source of the funds, and that Mullaney's investors would not agree to such a disclosure. LeChasney told petitioner that it would take at least three weeks for him to convert that much cash into cashier's checks without triggering the currency reporting requirements. The meeting ended without an agreement. See Pet. App. A6-A7.

Apparently because of increasing cost overruns on his home, petitioner soon agreed to accept a cash deal. Negotiations continued over the next few weeks in several telephone conversations among Mullaney, LeChasney, and petitioner. In one conversation, Mullaney told petitioner that although he had been told by his clients that the funds constituted "flight capital," the presence of such large amounts of cash made him nervous at times because "the specter of

drugs is there." Mullaney assured petitioner, however, that Mullaney himself was not involved in drug transactions. Mullaney also told petitioner that "some of the manipulations * * * with the cash may well be illegal in and of themselves," especially in light of reporting requirements for cash transactions in excess of $10,000. See Pet. App. A7-A8.

On September 13, Mullaney, LeChasney, and petitioner met at the Greenbriar Resort in White Sulphur Springs, West Virginia. Mullaney secretly recorded the conversations. Following an extensive discussion, Mullaney agreed to provide petitioner with $800,000. LeChasney indicated that he could convert $100,000 per day into cashier's checks. Mullaney asked whether LeChasney intended to "stay under the ten thousand dollars." Petitioner added, "I assume you are, aren't you, Charles?" LeChasney replied affirmatively. Mullaney also told petitioner that he was unable to rule out drug proceeds as a source of the cash, and that it was his "gut feeling" that "there are narcotics dollars in there." Petitioner assured the agent that he would keep the information confidential. He also stated that he was merely using LeChasney as his buffer and that "where Charles gets his money is his business, his problem." Petitioner concluded by stating that he was undecided about the deal and wanted to "sleep on it." See Pet. App. A9-A10; Gov't C.A. Br. 12-13.

On September 18, Mullaney told LeChasney that he would deliver $150,000 in advance and the $650,000 balance directly to petitioner when the note was transferred. A meeting was planned for September 24, for the purpose of delivering $150,000. On September 24, Mullaney advised LeChasney by telephone

that he could not produce the advance payment until September 26. In anticipation of receiving $150,000 from Mullaney, LeChasney agreed to advance that amount to petitioner. On September 25, LeChasney gave petitioner a $150,000 check, and petitioner gave his $1,000,000 note to LeChasney. Petitioner then delivered the $150,000 check to the contractor working on his home. See Pet. App. A10-A11; Gov't C.A. Br. 15-17.

The balance of the loan was to have been received by petitioner that weekend. On Saturday evening, however, petitioner called Mullaney and declared that he had decided not to proceed with the loan because of concerns about potential liability. Petitioner retrieved the $150,000 check from his general contractor and returned it to LeChasney. LeChasney, in turn, returned petitioner's note to him. See Pet. App. A11.

2. In January 1988, LeChasney was indicted for money laundering. When he learned of LeChasney's arrest, petitioner gave a statement to IRS agents in which he discussed his need for funds, his introduction to Mullaney through LeChasney, and the meetings with Mullaney. Petitioner also testified before a grand jury about his negotiations with Mullaney and LeChasney; that testimony subsequently formed the basis for a ten-count indictment on perjury charges.[1] Among other things, petitioner testified that he was unaware that Mullaney's investors had insisted on keeping their identities secret (Count 2); that he had walked away from the proposed transaction when

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[1] The textual summary describes only nine counts; Count 4 was dismissed at trial. See Pet. App. A13.

Mullaney stated at the Greenbriar that he had a "gut feeling" that "narcotics dollars" were included in the source money (Count 3); that Mullaney had not admitted at the Greenbriar that the cash included drug-sale proceeds (Count 5); that he repeatedly had insisted that the cash not be delivered in his presence (Count 6); that the $150,000 check petitioner received from LeChasney was not connected to the transaction with Mullaney (Count 7); and that he did not give the $150,000 check to the contractor working on his home (Count 8). Petitioner also claimed that he did not recall having discussed with Mullaney and LeChasney violations of federal criminal law that would occur in the handling of the money (Count 1); denied that he had discussed currency transaction reporting forms with Mullaney or LeChasney at the Greenbriar (Count 9); and claimed that Mullaney never told him why they were dealing in cash (Count 10). See Pet. App. A11-A13.

After petitioner testified before the grand jury that he was not familiar at the time of the transactions with federal laws prohibiting the structuring of transactions to evade the currency reporting requirements, the prosecutor remarked (Pet. App. A15):

> Mr. Swindall, and I don't mean to sound facetious, but you're telling us that as a member of the Banking Committee and as a member of Congress who, I would assume, and I don't even know how you voted on this issue, but I would assume you voted for the passage of this act, and you were on the—specifically on the Banking Committee, and you're telling the grand jury now that you didn't even know it was in existence until Friday?

3. Because of petitioner's contention that he had not been aware of the federal restrictions on money laundering, the government introduced at trial the reports of the House Judiciary Committee on 1986 money-laundering legislation and a similar report from the House Committee on Banking, Finance and Urban Affairs. The government also introduced excerpts from the Congressional Record reflecting petitioner's appointment to the Judiciary and Banking Committees. See Pet. App. A14, A16-A18.

Petitioner relied on testimony by Representative Barney Frank, who also served on the House Judiciary and Banking Committees. Frank testified that petitioner was not on the Banking Committee in 1986 when Congress passed the statute that prohibited the structuring of currency transactions. He also testified that members of Congress tend to become expert on specific bills and often lack knowledge of the details of all legislation considered by their committees. When defense counsel began to examine Frank on lists of bills considered by the Banking and Judiciary Committees during the relevant years, the prosecutor objected to Frank's testimony and told the court outside the presence of petitioner or his counsel that he had a document indicating that petitioner "co-authored in the Judiciary Committee the money laundering bill." After disclosing the prosecutor's remarks to petitioner, the district court struck Representative Frank's testimony. The court nevertheless allowed petitioner to introduce, as "self-authenticating," documents listing bills considered by the House Judiciary and Banking Committees. Pet. App. A68-A70; see *id.* at A18-A19.

The jury found petitioner guilty on the nine counts of perjury submitted to it. See Pet. App. A13.

4. The court of appeals affirmed petitioner's convictions on all of the counts except Counts 1, 9, and 10, which it vacated based on its conclusion that the government had violated the Speech or Debate Clause of the Constitution, Article I, Section 6, Clause 1. Pet. App. A1-A56.

a. The court first held that evidence pertaining to petitioner's positions on the House Judiciary and Banking Committees violated his Speech or Debate Clause privilege, and required reversal of the convictions on three of the counts (1, 9, and 10). Pet. App. A14-A38. The court explained that the government had used petitioner's committee memberships to show that he knew the details of federal statutes that prohibited the laundering of drug proceeds and structuring cash transactions to circumvent the filing of a currency transaction report. *Id.* at A17-A18. The court reasoned that use of the evidence "to prove that he performed a legislative act to acquire knowledge of the contents of the bills [was] * * * precisely what the clause prohibits." *Id.* at A30.

The court determined, however, that petitioner's constitutional claim affected only Counts 1, 9, and 10. Pet. App. A20-A22. The court stated that on those three counts[2] the government's evidence that peti-

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[2] As explained above, Count 1 charged that petitioner falsely claimed that he did not recall having discussed with Mullaney and LeChasney violations of federal criminal law that would occur in the handling of the money; Count 9 charged that he falsely denied that he had discussed currency transaction reporting forms with Mullaney or LeChasney at the

tioner's service in the House had given him "unique and specific knowledge" might have been relevant to the jury. *Id.* at A20. By contrast, the court determined that "[t]he remaining counts are unaffected by [petitioner's] Speech or Debate claims because the government did not attempt to prove [petitioner's] 'unique and specific knowledge' of the specific contents of [the relevant statutes] to give him a motive to lie." *Id.* at A21. The court explained that the other counts concerned "such matters as whether [petitioner] walked away from the deal, how close he came to an agreement, or whether he discussed using LeChasney to shield him from liability." *Id.* at A22. Because petitioner's knowledge of the money-laundering and currency-structuring statutes was not relevant to any of those counts, the court affirmed the convictions on those counts. *Id.* at A56.

b. Because the court dismissed Counts 1, 9, and 10 on Speech or Debate Clause grounds, the court did not reach petitioner's claim that the district court improperly struck the testimony of Representative Barney Frank after holding an unannounced ex parte conference with the prosecutor. Pet. App. A39. The court explained that the "ex parte conference did not affect the fairness of the rest of the trial and thus cannot be grounds for reversal of the remaining counts." *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 7-24) that the court of appeals should have dismissed all the counts of the indictment because the government elicited testi-

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Greenbriar; and Count 10 charged that he falsely claimed that Mullaney never told him why they were dealing in cash.

mony of his committee memberships before the grand jury and at trial in violation of the Speech or Debate Clause. He broadly asserts that Speech or Debate Clause violations are not subject to harmless-error analysis; whenever such a violation occurs, petitioner argues, the harm infects the entire proceeding and requires dismissal of all counts or vacation of all convictions. *Id.* at 7-12, 19-24. More narrowly, petitioner disagrees with the court of appeals' factual assessment that six of the nine counts were unaffected by the Speech or Debate Clause evidence in this case. *Id.* at 12-19. Neither of those contentions has merit.

a. The Speech or Debate Clause provides that "for any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place." The Clause bars the government from introducing in a criminal prosecution evidence of a legislative act of a member of Congress. *United States* v. *Helstoski*, 442 U.S. 477, 487 (1979). It does not, however, provide immunity to a congressman for criminal violations. See *id.* at 487-488 ("[A] Member of Congress may be prosecuted under a criminal statute provided that the Government's case does not rely on legislative acts or the motivation for legislative acts.") (quoting *United States* v. *Brewster*, 408 U.S. 501, 512 (1972)). For example, in *Brewster* the Court permitted prosecution of an indictment containing superfluous references to legislative acts because the government did not have to use evidence of legislative acts to prove the charged offenses at trial. 408 U.S. at 526-527; see also *United States* v. *Johnson*, 383 U.S. 169, 185 (1966).

To be sure, a defendant is entitled to dismissal of a charge if a trial on that charge would expose him to a

Speech or Debate Clause violation. *Helstoski* v. *Meanor*, 442 U.S. 500, 508 (1979); *Johnson*, 383 U.S. at 184-185. But a Speech or Debate Clause violation before the grand jury does not require dismissal of charges unrelated to the defendant's status or actions as a member of Congress. Hence, in *Johnson* the Court allowed a retrial on a conspiracy charge even though the indictment charged, in part, that the defendant had been paid to make a speech in Congress. See *United States* v. *Johnson*, 337 F.2d 180, 184 (4th Cir. 1964) (quoting indictment), aff'd, 383 U.S. 169 (1966). The Court held that the Speech or Debate Clause did not bar a new trial on a conspiracy count "wholly purged of elements offensive to the Speech or Debate Clause." 383 U.S. at 185.

Contrary to petitioner's argument (Pet. 19-24), a Speech or Debate Clause violation bars prosecution only on counts that are tainted by the violation. See *United States* v. *Carney*, 665 F.2d 1064, 1065 (D.C. Cir.), cert. denied, 454 U.S. 1081 (1981); see also *Arizona* v. *Fulminante*, 111 S. Ct. 1246, 1263-1266 (1991) (harmless-error analysis applies to coerced confessions admitted in violation of the Fifth Amendment privilege against compulsory self-incrimination); *United States* v. *Hasting*, 461 U.S. 499, 507-509 (1983) (harmless-error rule applies to improper comment on defendant's silence at trial, in violation of the Fifth Amendment Self-Incrimination Clause); *Chapman* v. *California*, 386 U.S. 18, 21-22 (1967) (same). Where a violation of the Speech or Debate Clause results in nothing more than the admission of improper evidence, the violation presents the classic case for harmless-error review, because the evidence may be "quantitatively assessed in the context of

other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Fulminante*, 111 S. Ct. at 1264. Petitioner's argument (Pet. 19) ignores the significant difference between the Speech or Debate Clause violation that occurred here and the types of "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." *Fulminante*, 111 S. Ct. at 1265.

Petitioner nevertheless contends (Pet. 12) that wholesale dismissal is needed to deter prosecutors from using Speech or Debate Clause evidence to obtain multiple count indictments. That argument fails in the Speech or Debate Clause context for the same reason that it fails where evidence is admitted in violation of some other provision of the Constitution. Because the decision of the jury to find a defendant guilty on counts that are unrelated to or unaffected by Speech or Debate Clause evidence is not likely to have been affected by the constitutional violation, affirmance of those counts "promotes public respect for the criminal process by focusing on * * * underlying fairness * * * rather than on the virtually inevitable presence of immaterial error." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986).

Finally, petitioner errs in claiming (Pet. 9-10, 20) that the decision below conflicts with *United States* v. *Helstoski*, 635 F.2d 200 (3d Cir. 1980), on remand from 442 U.S. 477 (1979), and *United States* v. *Johnson*, 337 F.2d 180 (4th Cir. 1964), aff'd, 383 U.S. 169 (1966). In *Helstoski*, all the charges stemmed directly from the defendant's membership and activities in the House of Representatives. The indictment charged that Helstoski accepted bribes from aliens in return for

introducing private immigration bills on their behalf. He was also charged with conspiracy, obstruction of justice, and making false material statements to the grand jury investigating the matter. 635 F.2d at 202. Because evidence of Helstoski's legislative acts formed the backdrop for all the charges, the court of appeals dismissed the entire indictment, explaining that the "infection cannot be excised." *Id.* at 205. The court made clear, however, that its decision was limited to "the circumstances of this case" and that it was not announcing a prophylactic rule requiring wholesale dismissal in every case. *Ibid.* Moreover, the court of appeals also based its judgment on the district court's determination that the "improper introduction of privileged matter permeated the whole [grand jury] proceeding" and that "any attempt to cull out single counts of the indictment" was "unrealistic." *Ibid.* In this case, by contrast, the improper evidence related only to specific counts, the convictions that have been vacated.

Similarly, the court of appeals in *Johnson* vacated the defendant's conviction on all counts, but it did so only because of the "unavoidable [conclusion] that th[e] mass of [inadmissible] evidence and comment * * * infected the jury's consideration of his innocence or guilt under the [remaining] counts." 337 F.2d at 204. In this case, of course, the court of appeals concluded that the record compelled a different conclusion. In short, no case supports petitioner's automatic dismissal rule, and the court of appeals properly affirmed petitioner's convictions on the six counts unaffected by a Speech or Debate Clause violation.

b. Petitioner also argues (Pet. 12-19) that even if wholesale dismissal is not required in every case, the courts below should have dismissed all counts of the indictment here because every count was tainted by the Speech or Debate Clause evidence. That fact-bound claim does not warrant review by this Court and is, in any event, incorrect.

First, petitioner argues (Pet. 14-17) that error on one count in a perjury prosecution necessarily affects all counts because the jury's verdict on all counts will turn on the defendant's credibility. But juries routinely return split verdicts in perjury cases and are fully capable of parsing the evidence count by count. See, *e.g.*, *United States* v. *Novod*, 923 F.2d 970, 971, aff'd in part and rev'd in part on rehearing on other grounds, 927 F.2d 726 (2d Cir.), cert. denied, 111 S. Ct. 2018 (1991); *United States* v. *Nixon*, 881 F.2d 1305, 1307 (5th Cir. 1989). There is therefore no force to petitioner's argument that multi-count perjury convictions are exempt from harmless-error analysis because juries are incapable of parsing the evidence.[3]

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[3] As petitioner notes (Pet. 15), the Fourth Circuit remarked in *United States* v. *Beach*, 296 F.2d 153, 160 (1961), that "jurors' minds are not that easily compartmentalized" and that a finding that the defendant lied with respect to one perjury count is likely to lead the jurors to conclude that he lied with respect to the other counts as well. To the extent that opinion suggests that it would be appropriate to reverse a perjury conviction even if it can be determined beyond a reasonable doubt that the error did not affect the conviction, its reasoning runs contrary to the principles of harmless-error analysis articulated in this Court's more recent decisions, such as *Fulminante*. We note that we are not aware of any federal appellate decision relying on that portion of the *Beach* opinion.

Second, petitioner contends (Pet. 17-19) that the evidence in fact was relevant to the six counts affirmed by the court of appeals. But he offers no substantial support for that contention. The six counts affirmed by the court of appeals charged that petitioner perjured himself when he testified that he was unaware that Mullaney's investors had insisted on keeping their identities secret (Count 2); that he had walked away from the proposed transaction when Mullaney stated at the Greenbriar that he had a "gut feeling" that "narcotics dollars" were included in the source money (Count 3); that Mullaney had not admitted at the Greenbriar that the cash included drug-sale proceeds (Count 5); that he repeatedly had insisted that the cash not be delivered in his presence (Count 6); that the $150,000 check petitioner received from LeChasney was not connected to the transaction with Mullaney (Count 7); and that he did not give the $150,000 check to the contractor working on his home (Count 8). Petitioner offers no basis for supposing that the evidence of petitioner's activities on the House Judiciary and Banking Committees was relevant to the jury's evaluation of those charges.[4]

---

[4] Two points appearing in petitioner's statement of the case merit a brief response. First, petitioner relies (Pet. 4) on testimony of the grand jury foreperson to support his claim that the Speech or Debate Clause evidence tainted all the counts of the indictment. But that testimony does not help petitioner. The foreperson testified before the district court on the issue of materiality and expressed the view that all the evidence presented to the grand jury made plain that the proposed transaction was illegal, and therefore that petitioner must have been aware of its illegality, contrary to his false claim of ignorance that formed the basis of Count 1. The foreperson did not suggest that petitioner's membership on the House Judi-

2. Petitioner also contends (Pet. 25-30) that the district court's ex parte conference with the prosecutor and its action in limiting Representative Frank's testimony require reversal of the remaining counts of conviction. Because the conference and Representative Frank's testimony related solely to the issue of petitioner's knowledge of federal money-laundering statutes, those actions were not relevant to the remaining counts for the same reason that the evidence introduced in violation of the Speech or Debate Clause was not relevant to those counts. In particular, it is clear that Representative Frank's testimony would not have been probative of the truthfulness of petitioner's testimony about his private negotiations with Mullaney and LeChasney. Because the court of appeals already had determined that it was appropriate to vacate the relevant counts of conviction, it properly refused to address the merits of those claims.

---

ciary and Banking Committees affected every count of the indictment.

Petitioner also errs in contending (Pet. 5) that the prosecutor argued at trial that the Speech or Debate Clause evidence proved "all of the perjury counts" and was " 'critical' to the entire indictment." To the contrary, although the prosecutor argued to the magistrate before trial that evidence of petitioner's committee membership was "critical to the prosecution of the case" because it related to petitioner's knowledge of the "federal currency laws," he did not suggest that the evidence related to all the counts of the indictment. Pet. App. A64. Likewise, during closing argument, the prosecutor referred to petitioner's committee membership only to show that he must have been "aware of the law." *Id.* at A71. The prosecutor never suggested that knowledge of the currency laws was germane to every count.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

MERVYN HAMBURG
Attorney

NOVEMBER 1993

SUPREME COURT, U.S.
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DEC 9
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(3)

No. 93-389

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

PATRICK L. SWINDALL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari To The United States Court of Appeals for the Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION

ROBERT G. FIERER
152 Nassau Street, N.W.
Atlanta, Georgia 30303
(404) 688-5500

WENDELL R. BIRD*
DAVID J. MYERS
Bird & Associates
1150 Monarch Plaza
3414 Peachtree Road, N.E.
Atlanta, Georgia 30326
(404) 264-9400

*Counsel of Record for Petitioner

TOWER PRINTING CO.

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REPLY TO BRIEF IN OPPOSITION

This is a perjury case. It is neither a money-laundering case nor a drug case. Petitioner has never been charged with any substantive crime. Had Petitioner refused to testify before the grand jury, there is no reason to believe that any charges would have been brought against him.[1] All of the charges relate to Petitioner's testimony before a grand jury that was investigating *only* possible violations of the "structuring transactions" provisions contained in Title 31. Gov. Ex. 44T at 3 (Pet. App. III at A-71, 72). Accordingly, Respondent's various references to Title 18 money-laundering violations or investigations are utterly irrelevant to the instant case.

STATEMENT OF THE CASE

Respondent's summary of the indictment, set forth in its Statement of the Case, misstates both the substance and content of each count presently before the court:

In summarizing Count 2, Respondent represents that "petitioner testified that he was unaware that Mullaney's investors had insisted on keeping their identities secret." (Reply at 5). In actuality, the prosecutor asked Petitioner, "Was there a statement concerning how well the money had been insulated from Mike's sources so that it could not be traced from the source to Mike, through LeChas-

---

[1]At Petitioner's Sentencing Hearing, the trial judge stated that "*there was no evidence* that Mr. Swindall had knowledge of the conspiracy to launder money to which Mr. LeChasney pled guilty. . . . Nor has the government proved that the crime of structuring a financial transaction to evade reporting laws actually occurred, that Mr. Swindall knew about it, and that he perjured himself." R. 39-12, 14 (emphasis added). (App. at A-5).

ney to you?" Petitioner responded, "No. I don't recall that." Count 2 (App. at A-1).

In summarizing Count 3, Respondent represents that Petitioner lied to the grand jury when he said that "he had walked away from the proposed transaction . . . at the Greenbriar." (Reply at 6). Respondent fails to mention the fact that Petitioner qualified his statement by telling the grand jury that "there is no doubt that *after that, after Greenbriar*, I was back into it." Gov. Ex. 44T at 97 (emphasis added) (App. at A-1).

In summarizing Count 5, Respondent represents that Petitioner told the grand jury that "Mullaney had not admitted at the Greenbriar that the cash included drug-sale proceeds." (Reply at 6) In fact, the actual question contained in Count 5 was a compound one, "Mr. Swindall, were you informed by Mike during that meeting in Greenbriar *that he violated the laws of the United States* and that it was *his feeling* that this money was narcotics dollars?" Count 5 (emphasis added). (App. at A-2). At trial, Mullaney acknowledged that he never told Petitioner that he "violated the laws of the United States." R. 25-41 (Pet. App. III at A-74).

In summarizing Count 6, Respondent represents that Petitioner told the grand jury that "he repeatedly had insisted that the cash not be delivered in his presence." (Reply at 6). A careful reading of Count 6 shows that, in context, the question was specifically limited to the period *after the September 13th meeting at the Greenbriar*. At trial, Mullaney testified that *the only time* petitioner agreed to accept money from Mullaney was during a conversation that took place on September 10, 1987, three days *before* the meeting at the Greenbriar. R. 25-54 (App. at A-4).

In summarizing Count 7, Respondent represents that Petitioner told the grand jury that "the $150,000 check that petitioner received was not connected to the transaction with Mullaney." (Reply at 6). In actuality, Petitioner never denied a connection between the $150,000 check and the transaction with Mullaney. Immediately after the statement quoted in Count 7, Petitioner stated that Mullaney's money would have been used to reimburse LeChasney the $150,000 that he advanced, *if* Petitioner and Mullaney subsequently reached an agreement on the details of the transaction they had discussed. Gov. Ex. 44T at 109 (Pet. App. III at A-72, 73).

In summarizing Count 8, Respondent represents that Petitioner told the grand jury "that he did not give the $150,000 check to his contractor." (Reply at 6). In actuality, Petitioner was never asked to whom he gave the $150,000 check. Petitioner's alleged perjurious statement about his having given the check to his secretary was made as an *incidental* part of Petitioner's overall account of how he returned LeChasney's attorney's $150,000 check on September 25, 1988. Count 8. (App. at A-2, 3). It is undisputed that Petitioner's secretary was the person who actually returned the check on September 28th. R. 28-156, 157 (App. at A-3, 4).

Respondent represents that "[b]ecause of petitioner's contention that he had not been aware of the federal restrictions on money laundering, the government introduced at trial the reports of the House Judiciary Committee on 1986 money-laundering legislation [Title 18]." (Reply at 7). *Respondent's representation in this regard is patently false. Petitioner has never* denied knowledge of Title 18 money-laundering legislation considered by the House Judiciary Committee on which he sat. Significantly,

before the grand jury, Petitioner was never once asked about any Title 18 money-laundering legislation considered by the House Judiciary Committee. The only legislation about which Petitioner was questioned during his grand jury appearance was Title 31 legislation that was considered *only by the Banking Committee*.

ARGUMENT

I. THIS COURT HAS NEVER SQUARELY ADDRESSED THE INFECTION ISSUE AS IT RELATES TO A SPEECH OR DEBATE VIOLATION BEFORE THE GRAND JURY.

Respondent argues that "a Speech or Debate violation before a grand jury does not require dismissal of charges unrelated to the defendant's status or actions as a member of Congress," relying on *United States. v Johnson*, 383 U.S. 169 (1966). Reply at 11. Respondent's argument in this regard fails for three reasons.

First, in *Johnson*, this Court never squarely addressed the issue whether a Speech or Debate violation *during a grand jury proceeding* requires dismissal of counts unrelated to a defendant's status as a member of Congress. *See Helstoski II*, 635 F.2d at 204. In *Johnson*, this Court limited its consideration to the effect of a violation that occurs during the trial of a case. In this case, the violation occurred during the trial of the case *and during the presentation of the case to the grand jury*. It is significant, however, that, in *Johnson*, this Court remedied the problem presented by the prosecutor's Speech or Debate violation during the trial of the case by requiring a new trial "wholly purged of elements offensive to the Speech or Debate Clause." 383 U.S. at 185. Implicit in such a requirement is the result that, when the violation occurs before the grand jury, and cannot, therefore, be wholly purged, as is the case presently, the

case must be dismissed.

Second, because in *Johnson* this Court and the Fourth Circuit were addressing a case where the Speech or Debate violation occurred during the trial, neither this Court nor the appeals court ever went behind the face of the indictment. In fact, as was noted by the Third Circuit in *Helstoski II*, "we do not know whether transcripts of the grand jury were available in *Johnson* and *Brewster*." 635 F.2d at 205.

Third, if Respondent is implying that the decisions of this Court and the Fourth Circuit in *Johnson* can be applied to a situation where the violation occurred before a grand jury, Respondent fails to explain how this case can be retried and, at the same time, meet this Court's requirement that the case be *wholly* purged of such elements. When the Third Circuit was confronted with this dilemma, it concluded that the Speech or Debate privilege was too important to ignore or dilute.

Respondent asserts that "no case supports petitioner's automatic dismissal rule." Reply at 13. Respondent's assertion is incorrect. The Third Circuit's decision *Helstoski II*, 635 F.2d at 205, unequivocally supports Petitioner's contention that, where a violation occurs before a grand jury, and cannot, therefore, be wholly purged of Speech or Debate violations, the case must be dismissed.

II. A CLEAR CONFLICT EXISTS BETWEEN THE CIRCUITS WITH RESPECT TO THE INFECTION ISSUE.

Notwithstanding Respondent's assertions to the contrary, the Eleventh Circuit's decision, particularly with respect to the infection issue in this case, is in irreconcilable conflict with the

decisions of the Third Circuit in *Helstoski II*, 635 F.2d 200, and of the Fourth Circuit in *United States v. Johnson*, 337 F.2d 180 (4th Cir. 1964). Assuming arguendo that this Court determines that Respondent is correct in its assertion that a Speech or Debate violation before the grand jury does not necessitate the quashing of an indictment in its entirety, the conflict between the circuits regarding the infection issue must still be resolved.

This is true because, in the instant case, the Eleventh Circuit specifically determined that the prosecutor's introduction of Speech or Debate material infected the grand jury's consideration of Petitioner's "knowledge or recollection of other matters".

> The impressions formed by the grand jury that Swindall was lying were based in part on the AUSA's questioning of the congressman about Speech or Debate matters. The grand jury observed Swindall respond to questions about his committee memberships, *and then judged the truthfulness of his statements disclaiming knowledge or recollection of other matters.*

971 F.2d at 1549. Petitioner's "knowledge or recollection of other matters" was the central issue of fact in the grand jury's consideration of Petitioner's innocence or guilt with respect to each and every count of the government's perjury indictment.[2]

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[2]As a matter of law, none of Petitioner's statements to the grand jury can be perjurious unless the statements were material to the grand jury's investigation. Inasmuch as the grand jury was focused exclusively on possible violations of the "structuring provisions" of Title 31 when Petitioner testified, Petitioner's knowledge of the filing requirements of the "structuring transactions" provisions of Title 31 were necessarily material to each and every count of the indictment in this case. In this regard, the Eleventh Circuit has held that "the prosecution need not prove the defendant was aware of the illegality of money structuring in order to convict the defendant of that offense under 31 U.S.C. Section 5324(3). The government need only prove that the defendant was aware of the bank reporting requirement for currency

Despite its determination that the Speech or Debate material infected the grand jury's consideration of Petitioner's guilt or innocence on "other matters", the Eleventh Circuit dismissed *only* those counts of the indictment that it deemed to be *wholly dependent* on the introduction of Speech or Debate material. The Eleventh Circuit's decision to apply a different infection test than the Third and Fourth Circuits have applied in cases that are factually indistinguishable resulted in its sustaining Petitioner's conviction on counts that were necessarily infected by the prosecutor's introduction of Speech or Debate material. The Eleventh Circuit's decision not to dismiss the other perjury counts in Petitioner's indictment, even though the court specifically determined that the prosecutor's introduction of Speech or Debate material obviously infected the grand jury's consideration of Petitioner's truthfulness regarding his "knowledge or recollection of other matters", directly conflicts with the Fourth Circuit's decision in *Johnson* and the Third Circuit's decision in *Helstoski II*.

In *Johnson*, the Fourth Circuit dismissed the *entire* indictment, even though "the evidence [was] sufficient to support

---

transactions in excess of $10,000 and sought to evade those requirements through money structuring." United States v. Brown, 954 F.2d 1563, 1568 (11th Cir. 1992). Thus, when the prosecutor asked Petitioner about his knowledge of the filing requirements of Title 31, it served the dual purpose of proving Petitioner's knowledge of illegality (an essential element of proof in Counts 1, 9, and 10 of the perjury indictment in the instant case) and Petitioner's awareness of the filing requirements of Title 31 (an essential element of materiality with respect to each and every count of the perjury indictment). It was the Eleventh's Circuit's failure to recognize the prosecutor's second purpose for questioning Petitioner about the Title 31 portion of the Omnibus Drug Act of 1986 that resulted in its failure to dismiss Counts 2, 3, 5, 6, 7 and 8 of the indictment in this case.

indictment, even though "the evidence [was] sufficient to support a guilty verdict on all counts [of the indictment]", because the court held that the introduction of speech or debate evidence "*infected the jury's consideration of [the defendant's] innocence or guilt under [the other counts]*." (Emphasis added) *Id.* at 204. In *Helstoski II*, the Third Circuit dismissed the entire indictment against Helstoski, even though "some counts [of the indictment] could be tried without reference to speech or debate matters". 635 F.2d at 203.

III. RESPONDENT MISSTATES THE THIRD CIRCUIT'S HOLDING IN HELSTOSKI II.

Respondent attempts to minimize the conflict between the Third Circuit's decision in *Helstoski II* and the Eleventh Circuit's decision in this case by arguing that, in *Helstoski II*, the Third Circuit "made clear, however, that its decision was limited to 'the circumstances of this case' and that it was not announcing a prophylactic rule requiring wholesale dismissal in every case." (Reply at 13). Respondent's deletion of the word "particularly" from its quote of the court's decision in *Helstoski II* yields this gross misinterpretation.

When the word "particularly" is reinserted, it is clear that the court was not limiting its holding to "the circumstances of this case." Instead, the court was limiting its holding to cases, like the instant case, where the Speech or Debate violation cannot be excised *because it occurred during the grand jury proceedings*:

> *Particularly* in the circumstances of this case, *where the infection cannot be excised*, we are unwilling to adopt an interpretation limiting a right the Court has told us is so vital that it must be treated with sensitivity.

Helstoski II, 635 F.2d at 205.

IV. HARMLESS ERROR ANALYSIS DOES NOT APPLY TO SPEECH OR DEBATE CLAUSE VIOLATIONS.

In its Reply brief, Respondent revives, and slightly modifies, the harmless-error argument that was rejected by the Third Circuit in *United States v. Helstoski*, 635 F.2d 200 (3d Cir. 1980) (*Helstoski II*). The Third Circuit rejected the government's contention that a harmless error standard should apply where a violation of the Speech or Debate Clause occurs. In rejecting the government's harmless error argument, the court recognized that "[t]he [Speech or Debate] privilege is not one of nondisclosure but of nonevidentiary use. *In re Grand Jury (Cianfrani)*, [563 F.2d 577, 584 (3d Cir. 1977)]." 635 F.2d at 203.

Respondent cites *United States v. Carney*, 665 F.2d 1064, 1065 (D.C. Cir.), *cert. denied*, 454 U.S. 1081 (1981), and *Arizona v. Fulminante*, 111 S.Ct. 1246, 1263-1266 (1991), as authority for its contention that a Speech or Debate violation bars prosecution *only* on counts tainted by the violation. But even the Eleventh Circuit recognized that this case and *Carney* are different. In its opinion in this case, the Eleventh Circuit recognized the general rule set forth in *U.S. v. Carney*, but noted that "[a] court will not consider evidence received by the grand jury, however, when what transpired before the grand jury itself violates a constitutional privilege." *See* [*United States v. Calandra*, 414 U.S. 338, 346 (1974)]; *Helstoski II*, 635 F.2d at 203." *United States v. Swindall*, 971 F.2d 1531, 1547 (11th Cir. 1992). The Eleventh Circuit determined that the prosecutor's violation of Petitioner's Speech or Debate privilege tainted the jury's opinion of Petitioner's truthfulness, one of the elements

that is common to each and every count of the perjury indictment in this case. 971 F.2d at 1549.

The Third Circuit thoroughly analyzed this Court's decisions in *Brewster* and *Johnson* and concluded that a harmless-error analysis was inappropriate because "the protection is far broader than a simple prohibition against an offer to prove a legislative act. '[The clause] provides that Members shall not be questioned in any other Place.' *United States v. Helstoski*, [442 U.S. 477, 489 (1979)]." 635 F.2d at 204. *Helstoski II* is factually indistinguishable from this case, and the same result should follow here.

V. REP. FRANK'S TESTIMONY WAS RELEVANT TO EACH AND EVERY COUNT OF THE INDICTMENT.

Respondent argues that Congressman Frank's testimony "related solely to the issue of petitioner's knowledge of federal money-laundering statutes" and was "not relevant to the remaining counts for the same reason that the evidence introduced in violation of the Speech or Debate Clause was not relevant to those counts." (Reply at 16). Respondent ignores the fact that Petitioner's knowledge of the filing requirements contained in the "structuring transactions" provisions of Title 31 was material to each and every count of the indictment because the grand jury investigation at the time of Petitioner's appearance was exclusively focused on the "structuring transactions" provisions of Title 31. *See supra* n. 2. Accordingly, Respondent's argument in this regard is without merit.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

ROBERT G. FIERER
152 Nassau Street, N.W.
Atlanta, Georgia 30303
(404) 688-5500

WENDELL R. BIRD*
DAVID J. MYERS
Bird & Associates
1150 Monarch Plaza
3414 Peachtree Road, N.E.
Atlanta, Gerogia 30326
(404) 264-9400

*Counsel of Record for Petitioner

APPENDIX (EXCERPTS OF RECORD)

APPENDIX (EXCERPTS OF RECORD)

[Gov. Ex. 44T] PETITIONER'S GRAND JURY TESTIMONY A-1

[R. 2] INDICTMENT A-1

[R. 28-156, 157] SECRETARY'S TRIAL TESTIMONY A-3

[R. 25-54] MULLANEY'S TRIAL TESTIMONY A-4

[R. 39-10, 12-14] TRIAL JUDGE STATEMENT AT SENTENCING A-4

APPENDIX (EXCERPTS OF RECORD)

[GOVT. EX. 44T] PETITIONER'S GRAND JURY TESTIMONY

[97] A. Craig, there is no doubt that after -- that after Greenbriar I was back into it. And I stayed back into it, in the sense that all along I tell you I was trying to rationalize, figure out a way that this thing could be legitimate in a technical sense, and I never could achieve that end. In my mind, it could never be legitimate. And that's why I withdrew.

[R. 2] INDICTMENT

COUNT 2

Q. Do you recall engaging in a conversation about how well Mike's sources have covered their end of the deal, in terms of the money being traced?

A. *No.* I'm not even sure I understand that question. I don't recall it.

Q. Was there a statement concerning how well the money had been insulated from Mike's sources so that it could not be traced from the source to Mike, through LeChasney, to you?

A. *No. I don't recall that.*

COUNT 3

A. . . . And then I looked at him eyeball-to eyeball, and this was at the Greenbriar, and I said, Mike, would you do this, if you were me? And he said, no; I wouldn't. And I said, I don't

think I want to do it either. *And I walked away from it, basically* – I felt good about it because I really felt like what he was saying was, you don't have to worry about this; the deal won't be done, and you don't have to worry about it.

COUNT 5

Q. Mr. Swindall, were you informed by Mike during that meeting in Greenbriar that he violated the laws of the Unites States and that it was his feeling that this money was narcotics dollars?

A. *I don't recall any conversation like that.* The only conversation that I recall with Mike about that was when I asked him, would you do this, Mike? And I asked him, is this drug money? And he said he couldn't tell me it wasn't. But, no. I don't remember any tech – Craig, the reason I don't think that happened is folks don't talk technically like that. If he had of started talking technically, I think I would have remembered it because those are very technical terms of art that you're talking about.

COUNT 6

Q. And what I'm saying is, following that conversation, did you continue to negotiate how the deal would be transpired by using Charles LeChasney as your buffer in this transaction?

A. *I continuously said, I will not take money from you directly.* If that is the same -- I don't remember saying, Charles –

COUNT 8

A. Also, the last sentence in paragraph twenty-eight, Swindall said he may have been the one to actually return the check

after returning to Atlanta. I wouldn't have said that because I didn't return to Atlanta. I called by secretary, during that week-end. It was probably Saturday, September 26th. And it was Sandra, who is Merline's daughter, that I told that to. Both work for me. And mentioned to her to have the check returned, and *I had given the check to Merline on Friday and told her to hold it until Monday morning, and I would give her instructions as to whether or not she should deposit it.* Okay. And I've already covered the one about the twenty-nine -- of at least a thousand dollars.

[R. 28-156, 157] SECRETARY'S TRIAL TESTIMONY

[156] Q. Now, later on did there come a time when you received something, a check from another person?

A. Yes.

Q. And who did you get that check from?

[157] A. I remember it now to be John Sauers.

Q. And what was that check–Do you remember who it was made out to?

A. It was made out to Pat.

Q. And how much was it for?

A. $150,000.

Q. Was the check endorsed?

A. I believe it to be, yes.

Q. And why do you believe it to be? Can you tell us a little bit about that?

A. Well, first I can visualize it, looking at it and seeing that it was endorsed, and most of all because on the day that I returned it Pat called after I had returned it and said did you

void the check before you returned it. And I said no, which put me into a panic thinking that I had not done this and he had endorsed the check.

Q. Did you personally take the check somewhere else or did someone come and get it?

A. Someone came to get it.

Q. Do you know how came and got it?

A. I cannot remember. I know that I called Douglas Daum. I do not remember whether he came to pick it up or a courier picked it up, but I did not take it anywhere.

[R. 25-54] MULLANEY'S TRIAL TESTIMONY

Q. Now, in terms of what you testified earlier to about Mr. Swindall agreeing to accept the money, this was the conversation on September the 10th before you went for your walk at the Greenbriar, correct?

A. Yes, Sir.

Q. That was the only time that Mr. Swindall agreed to accept cash from you?

A. Yes, Sir. The other time at the Greenbriar it was left open when we left the Greenbriar.

Q. There was never an agreement at the Greenbriar, was there?

A. No, Sir at the Greenbriar it was left open that he was going to sleep on it.

[R. 39-10, 12-14] TRIAL JUDGE STATEMENT AT SENTENCING

[10] The government claims, but has completely failed to prove, that Mr. Swindall's testimony before the grand jury was in respect to the crime of money laundering. There is no evidence that the crime of money laundering was committed in connection with the negotiations among Mr. Swindall, Mr. LaChasney and Mr. Mullaney at the Marriott Marquis in Atlanta, the Greenbriar, or anywhere else.

. . .

[12-14] There was no evidence that Mr. Swindall had knowledge of the conspiracy to launder money to which Mr. LeChasney pled guilty. . . .

Nor has the government proved that the crime of structuring a financial transaction to evade reporting laws actually occurred, that Mr. Swindall knew about it, and that her perjured himself.

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No. 93-389

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

PATRICK L. SWINDALL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari To The United States Court of Appeals for the Eleventh Circuit

PETITONER'S SUPPLEMENTAL BRIEF PRESENTING LATE AUTHORITY

ROBERT G. FIERER
152 Nassau Street, N.W.
Atlanta, Georgia 30303
(404) 688-5500

WENDELL R. BIRD*
DAVID J. MYERS
Bird & Associates
1150 Monarch Plaza
3414 Peachtree Road, N.E.
Atlanta, Georgia 30326
(404) 264-9400

*Counsel of Record for Petitioner

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United States v. Helstoski, 442 U.S. 477 (1979) 2, 3, 4, 6

United States v. Johnson, 383 U.S. 169 (1966) 2, 3, 6

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PETITIONER'S SUPPLEMENTAL BRIEF PRESENTING LATE AUTHORITY

On December 3, 1993, after the Respondent's Brief in Opposition in this case was filed, the United States District Court for the District of Nebraska entered a decision in the case of *United States v. Durenberger,* Cr. No. 3-93-65, slip op. at 1 (D. Neb. Dec. 3, 1993) (App. at A-1). In Durenberger, the district court addressed the same issue presented in this case and concluded that when the government violates a member of Congress' privilege under the Speech or Debate Clause of the United States Constitution and the violation occurs before a grand jury, the indictment is invalid and must be dismissed. Slip op. at 6 (App. at A-7). Significantly, in *Durenberger*, there was no claim that the government relied upon Speech or Debate material to secure the indictment against Durenberger. Slip op. at 4 (App. at A-5).

The district court's decision in *Durenberger* underscores the severity of the conflict that exists between the circuits with respect to the test to be applied when a grand jury proceeding is infected by a Speech or Debate violation. It also underscores the injustice that would result should this Court fail to resolve this conflict, thereby allowing Petitioner to be afforded less protection by the Speech or Debate clause than other members of Congress have been afforded by the exact same clause, simply because Petitioner was subject to the jurisdiction of a different court.

In *Durenberger*, defendant David Durenberger appeared before the Senate Ethics Committee as a United States Senator while under investigation for alleged misconduct. After Durenberger appeared

before the Senate Ethics Committee, the government presented select pages from the Report of the Select Committee on Ethics and the Report of the Special Counsel on Senate Resolution 311 to a grand jury that was also investigating Durenberger. Afterwards, the grand jury indicted Durenberger for substantive crimes that Durenberger had allegedly committed while serving in the United States Senate. Slip op. at 2 (App. at A-3).

ARGUMENT

I. THE DISTRICT COURT'S DECISION IN DURENBERGER DEMONSTRATES THE INEQUITABLE RESULTS IN THE VARIOUS CIRCUITS WITH RESPECT TO THE EFFECT OF SPEECH OR DEBATE VIOLATIONS THAT OCCUR DURING GRAND JURY PROCEEDINGS.

The district court's decision in *Durenberger* is significant because it graphically demonstrates the inequitable results that have occurred in the various circuits when the privilege afforded members of Congress by the Speech or Debate Clause is violated during grand jury proceedings. Specifically, in *Durenberger*, the district court concluded that, when a violation occurs during a grand jury proceeding in the Eighth Circuit, the principles established by this court in *United States v. Johnson*, 383 U.S. 169 (1966), *United States v. Gravel*, 408 U.S. 606 (1972), and *United States v. Helstoski*, 442 U.S. 477 (1979), *mandate* that the indictment be dismissed without prejudice, even though the government did not rely on the offensive material in bringing its indictment. Slip op. at 4 (App. at A-5).

In dismissing the indictment against Durenberger, the district

court reached the same result that the Third Circuit reached in *United States v. Helstoski*, 635 F.2d 200 (3d Cir. 1980) (*Helstoski II*), when it determined that, when a violation of the Speech or Debate clause occurs during a grand jury proceeding, the indictment is invalid and must be dismissed *as to each and every count, even if some of the counts did not depend on Speech or Debate material for their proof.* The results in the Eighth and Third Circuits are quite different from the result reached by the Eleventh Circuit in this case.

In the instant case, the Eleventh Circuit dismissed only three of the nine counts in Petitioner's indictment because, in the view of the court of appeals, "Swindall's Speech or Debate claims affect[ed] only Counts One, Nine and Ten. Only with respect to these counts did the government use evidence of Swindall's committee memberships" to prove its case. *United States v. Swindall*, 971 F.2d 1531, 1542 (11th Cir. 1992) (Pet. App. I at A-20). Consequently, because Petitioner was indicted in the Eleventh Circuit, rather than in the Eighth or Third Circuits, he was not afforded the same degree of constitutional protection that former United States Representative Helstoski and United States Senator Durenberger were afforded in similar situations *but different circuits*.

II. THE DISTRICT COURT'S DECISION IN DURENBERGER DEMONSTRATES THE CONFUSION THAT THE ELEVENTH CIRCUIT'S DECISION IN THIS CASE HAS CAUSED WITH RESPECT TO THE REMEDY THAT IS TO BE APPLIED WHEN A SPEECH OR DEBATE VIOLATION OCCURS DURING A GRAND JURY PROCEEDING.

The district court's decision in *Durenberger* is also

significant because it vividly demonstrates the confusion that has resulted from the disparity that exists between the Eleventh Circuit's express recognition of the principles established by this Court in *Johnson*, *Gravel*, and *Helstoski* and its subtle, but nonetheless substantial, failure to actually apply those principles to all of the counts of Petitioner's indictment.[1] In fact, as can be seen in the following excerpt from the district court's decision in *Durenberger*, the Eleventh Circuit's failure to apply the principles set forth in *Johnson*, *Gravel*, and *Helstoski* is so subtle that the district court actually overlooked the distinction that the Eleventh Circuit made between the counts that relied upon Speech or Debate material for their proof and those that did not. The result of the district court's oversight was that it *erroneously* cited the instant case as authority for the principle that a violation of the Speech or Debate Clause during a grand jury proceeding mandates dismissal of an indictment *even though the government did not rely on the offensive material to secure the indictment*:

> I agree with the decision[s] rendered by the Third and Eleventh Circuit[s] that when a violation of the Speech or Debate Clause occurs during the grand jury proceedings, the privilege must be vindicated prior to trial. *Helstoski*

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[1]After correctly determining that Respondent violated Petitioner's Speech or Debate privilege during the grand jury proceedings in this case, the Eleventh Circuit concluded that the proper remedy was to dismiss *only those counts* that were dependent on Speech or Debate material for their proof. *See* Swindall, 971 F.2d at 1542 (Pet. App. I at A-20). *See* Swindall, 971 F.2d at 1538-1545 (Pet. App. I at A-11 through A-24).

[II], 635 F.2d at 1546-47. As the Third Circuit stated:

> It cannot be doubted, therefore, that the mere threat of an indictment is enough to intimidate the average congressman and jeopardize his independence. Yet, it was to prevent just such overreaching that the speech or debate clause came into being. A hostile executive department may effectively neutralize a troublesome legislator, despite the absence of admissible evidence to convict, simply by ignoring the privilege in a presentation to a grand jury. Invocation of the constitutional privilege at a later stage cannot undo the damage. If it is to serve its purpose, the shield must be raised at the beginning.

Helstoski [II], 635 F.2d at 205 (emphasis added).

> When presenting evidence to the grand jury, a prosecutor must uphold the Constitution and refrain from submitting evidence of past legislative acts or the motivation for performing such acts. *Id.* at 206. Therefore, the indictment against Senator Durenberger cannot stand.
>
> The dismissal shall be without prejudice, because reliance upon the offensive evidence does not appear to be necessary.

Durenberger, slip op. at 5-6 (App. at A-6, 7).

When the district court in *Durenberger* cited the instant case as supporting authority for its decision to dismiss the indictment without prejudice *because reliance upon the offensive evidence did not appear to be necessary*, it apparently did not notice that, in this case, the Eleventh Circuit did not dismiss without prejudice those counts in petitioner's indictment that (to the Eleventh Circuit's thinking) did not rely on the offensive Speech or Debate evidence that Respondent introduced during Petitioner's grand jury proceedings. Instead, the Eleventh Circuit affirmed Petitioner's convictions with respect to

each count that it determined (erroneously)[2] not to be dependent upon Speech or Debate material for its proof.

Should the government appeal the district court's decision in Durenberger to the Eighth Circuit Court of Appeals, the government will almost certainly argue that the district court's reliance on the Eleventh Circuit's decision in this case is misplaced because, in fact, the Eleventh Circuit's decision conflicts with the Third Circuit's decision in *Helstoski II* with respect to the necessity of dismissing the entirety of an indictment when a Speech or Debate violation occurs during a grand jury proceeding. The government's argument in this regard will be valid because the Eleventh Circuit's decision in this case very clearly conflicts with the Third Circuit's decision in *Helstoski II* with respect to the remedy to be applied when a member of Congress' Speech or Debate privilege is violated during a grand jury proceeding.

CONCLUSION

The Eleventh Circuit's failure to apply the principles established by this Court in *Johnson*, *Gravel*, and *Helstoski* has already created confusion among the circuits regarding the effect that Speech or Debate violations, during grand jury proceedings, have with respect to counts that are not dependent on Speech or Debate material for their proof. Unless

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[2]In fact, Respondent did rely on Speech or Debate material to prove that each count of Petitioner's indictment was material to the grand jury's investigation of possible violations of the "structuring transaction" provisions of Title 31. *See* Pet. Reply at 6 n.2.

this Court grants the Petition in this case, the confusion will continue. Moreover, if this Court does not grant this Petition, a grave injustice will result because Petitioner will have been afforded a significantly lesser level of constitutional protection than has been afforded to other members of Congress similarly situated. Accordingly, the Petition should be granted.

ROBERT G. FIERER
152 Nassau Street, N.W.
Atlanta, Georgia 30303
(404) 688-5500

WENDELL R. BIRD*
DAVID J. MYERS
Bird & Associates
1150 Monarch Plaza
3414 Peachtree Road, N.E.
Atlanta, Gerogia 30326
(404) 264-9400

*Counsel of Record for Petitioner

APPENDIX: UNITED STATES V. DURENBERGER, CR. NO. 3-93-65, slip op. (D. Neb. Dec. 3, 1993)

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Criminal No. 3-93-65

MEMORANDUM AND ORDER ON DEFENDANT DURENBERGER'S MOTION TO DISMISS

DAVID P. DURENBERGER,
MICHAEL C. MAHONEY,
PAUL P. OVERGAARD,

Defendants.

Following an in *camera* review of the testimony and exhibits from the federal grand jury proceedings against David Durenberger, I isolated two documents from an exhibit and granted the defendant an opportunity to review the documents and issue a response. The government was also granted the opportunity to reply to the defendant's response. Having carefully reviewed the submitted responses, I shall now consider the defendant's motion to dismiss, which is founded on two grounds. Durenberger first argues that his indictment should be dismissed because the government violated the Speech Debate Clause ("Clause") when it submitted to the grand jury selected pages from the Report of the Select Committee on Ethics and the Report of Special Counsel on Senate Resolution 311 ("Reports") pertaining to his alleged misconduct. Second, Duren-

berger contends the indictment against him should be dismissed because government counsel have committed prosecutorial misconduct in this case. I shall consider each ground separately.

I. SPEECH OR DEBATE CLAUSE

A. The Reports

In preparation for the resolution of this motion to dismiss, the parties extensively briefed the purposes and boundaries of the Clause. In addition, Magistrate Judge Cudd issued a well-reasoned Report and Recommendation, filing 127, in which he detailed both the historic and present-day judicial incorporations of the Clause. Therefore, I find it unnecessary to augment the impressive scholarship already submitted on the subject.

Rather, I find it necessary to resolve two issues: Did the submission of select pages from the Reports on Senator David Durenberger to the grand jury violated the Speech or Debate Clause? If so, does the constitutional violation mandate the dismissal of the indictment against him?

The Clause broadly protects members of Congress "against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts," *United States v. Erewater*, 403 U.S. 901, 525 (1972), and "precludes any showing of how [a member of Congress], acted, voted, or decided." *Id.* at 527. The Supreme Court has declared that "past legislative acts of a Member cannot be admitted without undermining the values protected by the Clause." *United States v. Helstoski*, 442 U.S. 447, 489 (1979). By submitting evidence of legislative acts the government may reveal to a grand jury "information about the performance of legislative acts and the legislator's motivation in con-

ducting official duties." *Id.* Disclosing information on legislative acts subjects a member of Congress to being "questioned" in a place other than the House or Senate, thereby violating the explicit prohibition of the Speech or Debate Clause." *Id.*

Relying on *Federal Election Comm'r v. Wright*, 777 F. Supp. 325, 530 (N.D. Tex, 1991), the government argues that committee reports, if privileged, are only privileged as to the members who participate in the report's preparation, not to the member whose conduct is at issue before the committee. I find the notion of extending the evidentiary privilege to a member of congress serving on a senate or house committee but not to a member of congress appearing before a committee illogical, and I decline to follow *Wright*.

The United States Supreme Court has declared that the Speech or Debate clause should be construed "broadly to effectuate its purpose." *United States v. Johnson*, 383 U.S. 169, 180 (1965). As I construe the clause, the privilege extends to a senator, representative, or high-ranking legislative aide engaged in a legislative act. The acts of investigating, conducting hearings, providing testimony, preparing reports, are all "integral part(s) of the deliberative and communicative process by which Members participate in committee...proceedings...with respect to...matters which the Constitution places within the jurisdiction of either House." *See Does v. McMillan*, 412 U.S. 306, 313 (1973) (quoting *United States v. Gravel*, 403 U.S. 606, 625 (1972)). As such, the official acts performed by senators sitting on the Senate Select Committee on Ethics, as well as acts by senators and their high-ranking aides appearing before the Committee, are protected by

the Clause. *Cf. McMillan*, 412 U.S. at 313.

The record establishes that David Durenberger appeared before the Senate Ethics Committee as a United States senator under investigation for alleged misconduct. Douglas Kelly appeared before the Committee as a former high-ranking aide to Durenberger. As such, I find both the representations of Durenberger and Kelly in the Reports as well as the Reports themselves to be within the sphere of protected legislative activity and, therefore, privileged. *Hutchinson v. Proxmire*, 443 U.S. 111, 124-25 (1979); *United States v. Swindall*, 971 F. 2d 1531, 1543 n. 12 (11th Cir. 1992); and *Miller v. Transamerican Press, Inc.*, 709 F. 2d 524, 529 (9th Cir. 1983).

The government advances the argument that submission of the Reports to the grand jury was harmless because the government never read from or referred to the Reports, and the grand jury never considered the Reports. Moreover, the government argues that submission of the Reports was harmless because the grand jury was given a precautionary instruction not to consider any findings and conclusions from other investigations.

Considering that the government submitted hundreds of pages of exhibit materials, it is conceivable that the grand jury never found, let alone read, the selected pages from the Reports. On the other hand, the government has conceded that the select pages from the Reports were marked and admitted into evidence as part of exhibit 23 to the December 2, 1992, testimony. The pages from the Reports accompanied the testimony of an important and prominent witness. it seems equally plausible that the grand jury members attached great significance to the factual findings of the Select

Committee on Ethics and Special Counsel and relied on the Reports to justify, in whole or in part its indictment against Durenberger. Because no one--including government council--knows what weight, if any, the grand jury attached to the selected pages from t he Reports, I cannot find that the constitutional error was harmless.

Nor does the claim that the government allegedly issued a precautionary instruction to the grand jury cure the constitutional violation. As the colloquy between government counsel and the grand jury was not transcribed, no record of a precautionary instruction is before me for review. Accordingly, I cannot find that the instruction was constitutionally sufficient.

Rather, I must find that the government, by including select pages from the Reports in the exhibit materials, impermissibly exposed the grand jury to privileged evidence and violated the defendant's rights under the clause.

B. The Indictment

The more difficult issue before me is whether my finding mandates dismissal of the indictment. In its brief opposing the motion to dismiss the government cites the case of *United States v. Brewster*, 408 U.S. 001 (1979) in support of its claim that the indictment is facially valid and should not be dismissed. I have studied the case and find that it does not control the disposition of the instant case. *Brewster* did not involve an explicit constitutional challenge that the government had improperly submitted to the grand jury evidence of a legislative act in violation of the clause. The defendant in *Brewster* did not contend, as in this case, that the government had introduced tainted evidence in

violation of the clause which mandated that the indictment be invalidated.

In its brief in support of dismissal the defendant claims that two appellate cases should persuade me to dismiss the indictment. *United States v. Swindall*, 971 F.2d 1501 (11th Cir. 1992) and *United States v. Helstoski Helstoski II*), 635 F. 2d 200 (3rd Cir. 1980). The legal issues in these cases are closely analogous; however, the underlying facts are distinguishable from the instant case. In *Swindall* the Eleventh Circuit dismissed the indictment because the Government had conceded that "evidence of Swindall's legislative acts was an essential element of proof with respect to the affected counts." *Id.* at 1549. There is no claim in this case that the government relied on the select pages of the Reports to secure the indictment against Durenberger. In *Helstoski*, the Third Circuit dismissed an indictment because the improper admission of privileged evidence "permeated the whole [grand jury] proceeding," *Id.* 635 F.2d at 205. Despite the defendant's contention to the contrary, I am not persuaded that this case involves of a pervasive, widespread violation of the Clause. Rather [this] case involves the submission to the grand jury of eleven pages taken from privileged Reports, which were included as part of a larger exhibit not prepared by the government nor ever referred to by the government.

After examining the facts of the case I have determined that *United States v. Gravel*, 408 U.S. 606 (1972) controls the disposition of the defendant's motion to dismiss. In *Gravel* the Supreme court declared that "the Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom

of speech, debate, and deliberation without intimidation or threats from the Executive Branch." *Id.* et 616. The Clause, the Court declared, "protects Members against prosecutions that directly impinge upon or threaten the legislative process." *Id.*

Both *Swindall* and *Helstoski* emphasize that the Clause is intended to protect a member of Congress engaged in legislative acts from criminal or civil liability. *Swindall* 971 F.2d at 1544; *Helstoski*, 635 F.2d at 202. Protection from criminal liability includes protection not only from conviction but from prosecution. *Id. See United States v. Helstoski (Helstoski I)* 442 U.S. 477, 488 (1979). Indeed, the Supreme Court has declared that "the central role of the Speech or Debate Clause [is] to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary." *United States v. Johnson*, 383 U.S. 169, 181 (1966).

Under the United States Constitution the Senate has a duty to discipline its members. U.S. Const. art. 1., § 5, cl, 2. The Senate has delegated this important legislative duty to the Select Committee on Ethics. The defendant contends and I agree that if a member of the Senate believes that his statements to the committee or the findings of the Committee and its Special Counsel could be introduced as evidence against him one day in a grand jury proceeding, then the intimidation caused by the prospect or criminal liability will chill senators and severely undermine the ability of the Committee to effectively investigate and discipline members. In order for the Committee to procure full cooperation in its investigations and proceedings, committee members, senators under investigation, and their high-ranking legislative aides must have the

assurance of knowing that their testimony is privileged as are the factual findings and conclusions of any reports issued by the Committee.

Unlike other constitutional challenges to indictments which the Supreme Court has rejected, the purpose served by the Clause is fundamentally different. In marked contrast to other constitutional guarantees, the Supreme Court has declared that "[t]he Speech or Debate Clause was designed neither to assure fair trials nor to avoid coercion. Rather, its purpose was to preserve the constitutional structure of separate, coequal, and independent branches of government." *United States v. Helstoski*, 442 U.S. 477, 491 (1979) (emphasis added). Accordingly, I find that in order to protect the integrity and independence of the Committee, I must dismiss the indictment against David Durenberger.

I have considered and rejected the option of staying the motion to dismiss until after trial. *Res United States v. Mechanik*, 475 U.S. 66, 76 (1986) (O'Connor, J., concurring). I agree with the decision rendered by the Third and Eleventh Circuit that a violation of the Speech or Debate Clause privilege occurs prior to trial. *Helstoski*, 638 F.2d at 204; *Swindall* 971 F.2d at 1546-47. As the Third Circuit stated:

> It cannot be doubted, therefore, that the mere threat of an indictment is enough to intimidate the average congressman and jeopardize his independence. Yet, it was to prevent just such overreaching that the speech or debate clause comes into being. A hostile executive department may effectively neutralize a troublesome legislator, despite the absence of admissible evidence to convict, simply by ignoring or threatening to ignore the privilege in a presentation to a grand jury. Investigation of the constitutional protection at a later stage cannot undo the

> damage. If it is to serve its purpose, the shield must be raised at the beginning.

Helstoski, 638 F.2d at 205 (emphasis added).

When presenting evidence to the grand jury, a prosecutor must uphold the Constitution and refrain from submitting evidence of past legislative acts or the motivation for performing such acts. *Id.* at 206. In this case government counsel did not uphold the Constitution. Therefore, the indictment against Senator Durenberger cannot stand.

The dismissal shall be without prejudice, because reliance upon the offensive evidence does not appear to be necessary.

II. PROSECUTORIAL MISCONDUCT

On an alternative theory the defendant moves the court to dismiss the indictment and disqualify the responsible government counsel on the basis or prosecutorial misconduct. Specifically, the defendant claims that (1) the government emphatically denied that the grand jury had been exposed to select portions of the Reports; (2) the government attempted to dissuade this court from conducting a full *in camera* review of the grand jury testimony and exhibits; and (3) the government sent an *ex parte* letter to the court informing the court that the grand jury had access to select pages from the Reports.

In *United States v. Morrison*, 449 U.S. 361, 365 (1981), the Supreme Court declared that "absent demonstrable prejudice , or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate."

In this case the defendant has made no showing of either actual

prejudice or a substantial threat of prejudice. It is true that had I not ordered a full *in camera* inspection of the grand jury proceedings, the selected pages from the Reports would not have been discovered and the defendant's constitutional right to prepare an adequate defense would have been impaired. However, I find no prospective threat of prejudice in allowing government counsel to proceed to trial.

After reviewing the arguments in favor of and in opposition to dismissal and disqualification, I am not persuaded that sufficiently serious misconduct has occurred in this case to warrant either dismissal or disqualification based on prosecutorial misconduct. Dismissal and disqualification founded upon prosecutorial misconduct are drastic remedial measures which I should hesitate to impose except when absolutely necessary. *See Matter of Grand Jury Subpoena of Roehon*, 872 F.2d 170, 176 (7th Cir. 1949) (quoted by Eighth Circuit in *United States v. Rosnov*, 977 F.2d 209, 411 (8th Cir. 1992)).

That I decline to impose these measures at this stage does not signify that I am not concerned with government counsels' conduct. Whether their conduct represents a case of overzealous prosecution by attorneys having little or no regard for prosecutorial ethics or a case of repeated inadvertence bordering on recklessness need not be resolved in the absence of a showing of prejudice or threat of future prejudice. I do remind counsel Sterch and Hulser that as government prosecutors and as officers of the court they are charged with the duties of due diligence and candor. Henceforth, government counsel shall make no misrepresentation to opposing counsel or to this court, lest I reconsider the request for disqual-

ification.

IF IS THEREFORE ORDERED that:

(1) the defendant Durenberger's motions to dismiss the indictment, filings 37 and 144, are granted and the indictment is dismissed without prejudice as the defendant Durenberger on the ground that the government violated the Speech or Debate Clause but are denied on the ground of prosecutorial misconduct; and

(2) defendant Mahoney's joinder with Durenberger's motion to dismiss for alleged prosecutorial misconduct, filing 147, is denied.

Dated December 3, 1993.

BY THE COURT

/s/ Warren K. Urbom
United States Senior District Judge